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REPORT
102-56

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UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1991

MAY 9, 1991.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MONTGOMERY, from the Committee on Veterans' Affairs, submitted the following

1008-C;
1008-D

REPORT

[To accompany H.R. 1578]

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[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1578) to amend title 38, United States Code, with respect to employment and reemployment rights of veterans and other members of the uniformed services, having considered the same, reports favorably thereon with an amendment, by unanimous voice vote, and recommends that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Uniformed Services Employment and Reemployment Rights Act of 1991".

SEC. 2. EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

Chapter 43 of title 38, United States Code, is amended to read as follows:

"CHAPTER 43—EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

"SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

"Sec.
"2021. Purposes.
"2022. Relation to other law and plans or agreements.
"2023. Definitions.

42-449

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"2061. Regulations.
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"SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

"§ 2021. Purposes

"The purposes of this chapter are—

"(1) to encourage noncareer service in the uniformed services of the United States by eliminating or minimizing those disadvantages to civilian careers and employment which would not occur but for such service; and

"(2) to minimize the disruption to the lives of individuals performing service in the uniformed services, as well as minimizing the disruption to employers, to fellow employees, and to the community, by providing for the prompt reemployment of persons completing service in the uniformed services under honorable conditions.

"§ 2022. Relation to other law and plans or agreements

"(a) Nothing in this chapter shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance) or any plan provided by an employer which establishes rights or benefits which are greater than or in addition to those provided in this chapter.

"(b) This chapter supersedes State laws (including any local law or ordinance), employer practices, agreements, and plans, and other matters that reduce, limit, or eliminate in any manner rights or benefits provided by this chapter, including the establishment of additional prerequisites to the exercise of such rights.

"§ 2023. Definitions

"For the purposes of this chapter:

"(1) The term 'Attorney General' means the Attorney General of the United States or any person designated by the Attorney General to carry out an activity under this chapter.

"(2) The term 'benefit', 'benefit of employment', or 'employment related rights and benefits' means any aspect of the employment relationship, other than wages or salary for work performed, provided by contract or employer practice or custom, that offers advantage, profit, privilege, gain, status, account, or interest and includes, but is not limited to, pension plans and payments, insurance coverage and awards, employee stock ownership plans, bonuses, severance pay, supplemental unemployment benefits, vacations, and selection of work hours or locations of employment.

"(3) The term 'completion of service in the uniformed services under honorable conditions' means the completion of a period of service in the uniformed services in all circumstances except—

"(A) receiving a dishonorable discharge, dismissal, or bad conduct discharge adjudged under chapter 47 of title 10;

"(B) being discharged under other than honorable conditions, under regulations prescribed by the Secretary of Defense or a Secretary concerned; or

"(C) being dismissed from or dropped from the rolls of a uniformed service under section 1161 of title 10.

"(4)(A) Except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or entity paying salary or wages for work performed or having control over employment opportunities, including—

"(i) any person, institution, organization, or entity to whom the employer has delegated employment-related responsibilities; and

"(ii) the Federal Government, any State or political subdivision thereof, and any private employer (including successors in interest).

"(B) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 2034(f).

"(C) In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the Adjutant General of the State in which the technician is employed.

"(5) The term 'Federal Government' includes the executive branch, the judicial branch, and the legislative branch, with the executive branch including—

"(A) any department, administration, agency, commission, board, or independent establishment in, or other part of, the executive branch (including any executive agency as defined in section 105 of title 5);

"(B) the United States Postal Service and the Postal Rate Commission;

"(C) any nonappropriated fund activity of the United States; and

"(D) any corporation wholly owned by the United States.

"(6) The term 'notice' means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

"(7) The term 'other than a temporary position' means a position of employment as to which there is a reasonable expectation that it will continue indefinitely.

"(8) The term 'qualified' means having the ability to perform the essential tasks of an employment position.

"(9) The term 'reasonable efforts' means actions, including training provided by an employer, that do not create an undue hardship on the employer.

"(10) The term 'Secretary' means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.

"(11) The term 'seniority' means longevity in employment together with any benefits of employment which accrue with or are determined by such longevity.

"(12) The term 'service in the uniformed services' means duty performed in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and the period of time an employee is absent from employment for the purpose of examination to determine fitness for such duty.

"(13) The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

"(14) The term 'uniformed services' means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard, including the reserve components thereof, the Army National Guard and the Air National Guard when engaged in active duty for training or in inactive duty for training, the commissioned corps of the National Oceanic and Atmospheric Administration, the commissioned corps of the Public Health Service, the Merchant Marine during time of war, national emergency, or when deemed necessary by the Secretary of Defense in the interest of national defense, and any other category of persons designated by the President in time of war or national emergency.

"SUBCHAPTER II—PROHIBITIONS, RIGHTS, AND LIMITATIONS

"§ 2031. Discrimination against members of the uniformed services and acts of reprisal prohibited

"(a) A person who is a member of, was a member of, applies to become a member of, or has an obligation to a uniformed service shall not be discriminated against because of such present or past membership, application for membership, or obligation by being denied initial employment, reemployment, continuation of employment, promotion, or any benefit of employment.

"(b)(1) It shall be unlawful for an employer to discriminate against, discipline, or to take any other action of reprisal against any person because such person has filed a complaint or sought assistance concerning an alleged violation of this chapter, has testified in any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised any right afforded by this chapter.

"(2) The prohibition in paragraph (1) shall apply with respect to employment, reemployment, continued employment, promotions, and any benefit of employment and shall apply regardless of whether the person with respect to whom the acts are performed has ever served in the uniformed services.

"(c) A person shall be considered to have been denied employment, reemployment, continued employment, any promotion or benefit of employment in violation of this chapter if the person's status or activity protected by this chapter was a motivating factor, although not necessarily the only factor, in the employer's decision to deny the person employment, reemployment, continued employment, or any promotion or benefit of employment, unless the employer can demonstrate that the same decision would have been made in the absence of the protected status or activity.

"§ 2032. Rights of persons absent from employment to serve in the uniformed services; limits on right

"(a) Except as otherwise provided in this chapter, any person who is absent from or leaves a position (other than a temporary position) in the employ of any employer for voluntary or involuntary service in the uniformed services is entitled to a leave of absence or is entitled, upon completion of service in the uniformed services under honorable conditions, to—

"(1) reemployment by such employer, unless such employer's circumstances have so changed as to make it impossible or unreasonable to do so; and

"(2) employment related rights and benefits,

as provided in this chapter.

"(b) Subsection (a) shall apply if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

"(1) that is required, beyond five years, to complete an initial period of obligated service;

"(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

"(3) performed as required pursuant to section 270 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined by the Secretary concerned to be necessary for professional development or for completion of skill training or retraining;

"(4) performed by a member of a uniformed service who is—

"(A) ordered to or retained on active duty under section 672(a), 672(g), 673, 673b, 673c, or 688 of title 10;

"(B) ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress;

"(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 673b of title 10;

"(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or

"(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 3500 or 8500 of title 10; or

"(5) any other category of service specified by the Secretary, in consultation with the Secretary of Defense, in regulations prescribed pursuant to section 2061.

"(c) Upon completion of service in the uniformed services under honorable conditions, a person returning from a leave of absence or otherwise entitled to reemployment under this section shall, in order to retain the member's rights under this chapter except as otherwise expressly provided, report to such person's employer for reemployment—

"(1) at the beginning of the first regularly scheduled working period on the first calendar day following completion of such service and the time for safe transportation back to the member's residence and to the member's place of employment—

"(A) if such person's period of service was less than 31 days; or

"(B) if such person's service was for the purpose of examination to determine such person's fitness to enter service in the uniformed services, regardless of the length of such service;

"(2) not later than 14 days following completion of such service and transportation, if such person's period of service was 31 days or more but less than 181 days; or

"(3) not later than 90 days following completion of such service and transportation, if such person's period of service was 181 days or more.

"(d) The time limits specified in subsection (c) for a person to report for employment or reemployment shall be extended—

"(1) by up to one year if the person is hospitalized or is convalescing from an illness or injury incurred in military service;

"(2) by up to two years if the person is a special disabled veteran described in section 2011(1)(A)(i) whose disability significantly impairs the veteran's ability to work and if such person informs, in writing or verbally, the employer concerned of the person's condition, intention to return to employment, and plans for and progress in rehabilitation; or

"(3) by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the time limit specified in paragraphs (1) and (2) impossible or unreasonable.

"(e) A person who fails to report for employment or reemployment within the time limits specified in subsection (c) does not automatically forfeit such person's right under subsection (a) but shall be subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

"(f)(1) When reporting for reemployment upon release from service in the uniformed services, a person, upon request, shall provide to the person's employer such documentation, if any, as is then readily available to establish that the person's application is timely, that the person has not exceeded the service limitations set forth in subsection (b), and that the person completed service in the uniformed services under honorable conditions. Documentation from any official source that these criteria have been met shall satisfy the documentation requirements established by this subsection.

"(2) It shall be unlawful for an employer to delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

"(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

"(h) Any employer who reemploys a person under this chapter and who is an employer contributing to any multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(37)), under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of every such reemployment, provide notice of such reemployment to the administrator of every such plan.

"(i) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of such training or service if the service does not exceed the limitations set forth in subsection (b) and the notice requirements established in section 2034(d) are met.

"§ 2033. Position to which entitled upon reemployment

"(a) Except as otherwise provided in this chapter, a person who is entitled to reemployment under section 2032 shall—

"(1) if such person's period of service was fewer than 181 days—

"(A) first, be employed promptly in the position which such person would have attained by remaining continuously employed by such employer, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer; or

"(B) if not employed under subparagraph (A), be employed promptly in the same position which such person left for service in the uniformed services, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer;

"(2) if such person's period of service was 181 days or more—

"(A) first, be employed promptly in the position which such person would have attained by remaining continuously employed by such employer or in another position which is equivalent in seniority, status, and pay to such position, unless the employer can demonstrate that such person is not qualified for such position or any equivalent position and cannot become qualified with reasonable efforts by such employer; or

"(B) if not employed under subparagraph (A), be employed promptly in the same position which such person left for service in the uniformed services or in another position which is equivalent in seniority, status, and pay to such position, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer; or

"(3) if disabled because of a disability incurred during, or as a result of, a period of service in the uniformed services, and if, after reasonable efforts by the employer to accommodate the disability, such person is not qualified due to such disability to be employed in the position the person would have attained if the person had remained continuously employed by such employer or in the position which such person left for service in the uniformed services, be employed promptly—

"(A) in any other position which is equivalent in seniority, status, and pay and for which the person is qualified or would become qualified with reasonable efforts by the employer; or

"(B) if not employed under subparagraph (A), in a position which is the nearest approximation thereof consistent with circumstances of such person's case; or

"(4) if such person is not qualified to be employed in the position the person would have attained if the person had remained continuously employed by such employer or in the position which such person left for service in the uniformed services for any reason other than disability incurred during a period of service in the uniformed services and cannot become qualified with reasonable efforts by the employer, be employed promptly in any other position of lesser status and pay which such person is qualified to perform, with full seniority.

"(b) If two or more persons are entitled to reemployment under section 2032 in the same position and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to be reemployed in that position. Any person not reemployed in a position because of the application of the preceding sentence is entitled to be employed promptly—

"(1) in any other position which is equivalent in seniority, status, and pay and for which the person is qualified or would become qualified with reasonable efforts by the employer; or

"(2) if not employed under paragraph (1), in a position which is the nearest approximation thereof consistent with circumstances of such person's case.

"§ 2034. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

"(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had at the time such person left the job concerned for service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

"(b) A person who performs service in the uniformed services is considered to be on a leave of absence while in the uniformed services and is also entitled to such other rights and benefits, not determined by seniority, relating to other employees on furlough or leave of absence which were established, by contract, policy, or practice, at the beginning of such period of service or while such person is performing such service. Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to the preceding sentence.

"(c)(1) A person who performs service in the uniformed services shall, at such person's request, continue to be covered by insurance provided by such employer for up to 18 months. Such person may be required to pay the entire cost of any benefit continued pursuant to the preceding sentence, except that in the case of persons ordered to training or service for fewer than 31 days, such person may be required to pay only the employee share, if any, of the cost of such benefit.

"(2) In the case of employer-sponsored health benefits, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a person entitled to participate in that these benefits, either under paragraph (1) or upon reinstatement, or a health or physical condition of any other person who is covered by the benefits by reason of the coverage of such person, if—

"(A) the condition arose before or during that person's period of training or service in the uniformed services;

"(B) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the insurance; and

"(C) the condition of such person has not been determined by the Secretary of Veterans Affairs to be service-connected.

"(d) A person who leaves a civilian job for service in the uniformed services after the 60-day period beginning on the date of the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1991 shall give written or verbal notice to such person's civilian employer that service in the uniformed services will cause such person to be absent from scheduled civilian employment, except that no notice is required in circumstances in which giving notice is impossible or unreasonable, including but not limited to circumstances where providing notice is precluded by military necessity, as determined by the uniformed service concerned, with such determination not being subject to judicial review.

"(e) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

"(1) if such person's period of service was 181 days or more, within one year;

"(2) if such person's period of service was 31 days or more but less than 181 days, within six months; or

"(3) if such person's period of service was less than 31 days, within a period of time that is equal to the period of service concerned.

"(f)(1) In the case of a benefit provided by an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)), or a benefit provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this subsection.

"(2) Subject to subsection (g)(2), a person reemployed under this chapter—

"(A) shall not be treated as having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services; and

"(B) shall have each period served by such person in the uniformed services deemed to constitute service with the employer or employers maintaining the plan for purposes of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan,

if such person meets the eligibility criteria under this chapter.

"(g)(1) An employer reemploying a person under this chapter shall be liable to an employee benefit pension plan for funding any obligation of the plan to provide the benefits described in subsection (f)(2). For purposes of determining the amount of such liability, and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1145) or for purposes of any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed to be service with the employer pursuant to such subsection shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement.

"(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (f)(2) that are derived from employee contributions only to the extent the person makes payment to the plan with respect to such contributions (not to exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of deemed service described in subsection (f)(2)).

"(h) Any person who is absent from or leaves a position (other than a temporary position) in the employ of any employer for voluntary or involuntary service in the uniformed services may utilize, during any period of such service, accrued or other leave which the person could have utilized if the person had remained in such position.

"SUBCHAPTER III—PROCEDURES FOR ASSISTANCE AND ENFORCEMENT

"§ 2041. Assistance in obtaining employment or reemployment; assistance in asserting claims with respect to State or local government or private employers

"(a) The Secretary (through the Veterans' Employment and Training Service) shall provide assistance in obtaining employment or reemployment to any person entitled to rights or benefits under this chapter. The Secretary may use existing Federal and State agencies engaged in similar or related activities and the assistance of volunteers.

"(b) Any person who claims that a private employer or a State or political subdivision thereof has denied or is about to deny such person any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

"§ 2042. Assistance in obtaining employment or reemployment by the Federal Government

"(a) Except as provided in subsections (c), (d), and (e), if a person is entitled to be reemployed under section 2032 by the Federal Government, such person shall be reemployed in a position as described in sections 2033 and 2034.

"(b) Any person who claims that the Federal Government, as employer, has denied or is about to deny such person any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

"(c) If the employer of a person described in subsection (a) was, at the time such person entered service in the uniformed services, an agency in the executive branch, and the Director of the Office of Personnel Management determines that—

"(1) such employer no longer exists and its functions have not been transferred to another part of the executive branch; or

"(2) it is not feasible for such employer to reemploy such person,

the Director shall further identify an alternative position of like seniority, status, and pay for which such person is qualified in another part of the executive branch, and the Director shall cause employment in such position to be offered to such person.

"(d) If the employer of a person described in subsection (a) was, at the time such person entered service in the uniformed services, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that—

"(1) it is not feasible for such employer to reemploy such person; and

"(2) such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5,

such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch on the same basis as described in subsection (c).

"(e) If the adjutant general of a State determines that it is not feasible to reemploy a person who was a National Guard technician employed under section 709 of title 32, and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(d) of title 5, such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch of the Federal Government on the same basis as described in subsection (c).

"§ 2043. Enforcement of employment or reemployment rights with the Federal Government

"(a) Any person who claims that—

"(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by the Federal Government; and

"(2)(A) such employer has failed or refused to comply with the provisions of this chapter; or

"(B) the Office of Personnel Management has failed or refused to comply with the provisions of this chapter,

may file a complaint with the Secretary, and the Secretary shall investigate such complaint. Subsection (a) of section 2051 shall be applicable to such investigation but not subsections (b) and (c) of such section.

"(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint. Before the receipt of a written complaint, the Secretary shall, upon request, provide advice or technical assistance to the potential claimant and, if the Secretary determines it appropriate, to such claimant's employer.

"(c) If the Secretary, after investigation, is reasonably satisfied that such a violation has occurred, if efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation before the Merit Systems Protection Board, the Secretary shall refer the case to the Office of the Special Counsel. If the Special Counsel is reasonably satisfied that the person requesting representation is entitled to the rights or benefits sought, the Special Counsel shall appear and act as attorney for the claimant in filing an appeal to the Merit Systems Protection Board and in pursuing that appeal.

"(d) If the Special Counsel refuses to represent a person after receiving a referral from the Secretary or if a person chooses not to apply to the Secretary for assistance or to utilize the Special Counsel for representation under this section, such person may be represented before the Merit Systems Protection Board by counsel of the person's choice.

"(e)(1) If the Merit Systems Protection Board concludes that the Federal Government, as employer, has failed or refused to comply with the provisions of this chapter or that the Director of the Office of Personnel Management has not met an obligation set forth in subsection (c), (d), or (e) of section 2042, the Board shall enter an order specifically requiring the employing agency or the Director to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of the employing agency's or the Director's unlawful action.

"(2) Any such compensation shall be in addition to and shall not be deemed to diminish any of the other rights or benefits provided for by this chapter.

"(f)(1) A claimant under this chapter may petition the United States Court of Appeals for the Federal Circuit to review a decision of the Merit Systems Protection Board denying such claimant the relief sought, in whole or in part, subject to the conditions and in accordance with the procedures set forth in section 7703 of title 5.

"(2) The Secretary and the Special Counsel shall not represent persons with respect to review of decisions of the Merit Systems Protection Board under this chapter in the United States Court of Appeals for the Federal Circuit or the Supreme Court.

"(3) If a person seeks such judicial review, or in any case in which a person is involved in the Board's decision being appealed by another party, such person may be represented by counsel of the person's choice.

"§ 2044. Enforcement of employment or reemployment rights with a State or private employer

"(a) A person who claims that—

"(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by a State or political subdivision thereof or a private employer; and

"(2) such employer or potential employer has failed or refused to comply with the provisions of this chapter,

may file a complaint with the Secretary, and such complaint shall be investigated under the provisions of subchapter IV.

"(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint. Before the receipt of a written complaint, the Secretary shall, upon request, provide advice or technical assistance to the potential claimant and, if the Secretary determines it appropriate, to such claimant's employer.

"(c) If the Secretary, after investigation, is reasonably satisfied that such a violation has occurred, if efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation, the Secretary shall refer the case to the Attorney General. If the Attorney General is reasonably satisfied that the person requesting representation is entitled to the rights or benefits sought, the Attorney General shall appear and act as attorney for the claimant in the filing of a complaint and other appropriate motions and pleadings and the prosecution thereof.

"(d)(1) If any employer which is a private employer or a State or political subdivision thereof fails or refuses to comply with the provisions of this chapter, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the rights or benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the other rights or benefits provided for by this chapter.

"(2)(A) No fees or court costs shall be charged or taxed against any person claiming rights or benefits under this chapter.

"(B) In any action or proceeding to enforce a provision of this chapter by a person described in subsection (a) who obtained private counsel for such action or proceeding, the court, in its discretion, may award any such person who prevails in such action or proceeding a reasonable attorney's fee, expert witness fees, and other litigation expenses.

"(3) The court may use its full equity powers, including temporary or permanent injunctions and temporary restraining orders, to vindicate fully the rights or benefits of persons under this chapter.

"(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

"(5) If the Attorney General refuses to represent a person after receiving a referral from the Secretary or if a person chooses not to apply to the Secretary for assistance or to utilize the Attorney General for representation under this section, such person may be represented before the district court by counsel of the person's choice.

"(6) In any action under this chapter, only the employer shall be deemed a necessary party respondent.

"(7) No State statute of limitations shall apply to any proceedings under this chapter.

"(8) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

"(e) If reasonably satisfied that the provisions of this chapter have been willfully violated by a private employer or a State or political subdivision thereof, the Attorney General may file a pleading in a district court of the United States in which the private employer concerned maintains a place of business, or in which the State concerned or political subdivision thereof exercises authority, for the assessment of a civil penalty against such employer. If, as a result of the proceeding resulting from such a filing, the employer is found to have willfully failed or refused to comply with any provision of this chapter, a civil penalty of not more than $25,000 for each such failure or refusal may be assessed against such employer, taking into consideration criteria established in regulations by the Secretary for such purpose.

"SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

"§ 2051. Conduct of investigation; subpoenas

"(a) In carrying out investigations under this chapter, the Secretary's duly authorized representatives shall at all reasonable times have access to, for the purpose of examination, and the right to copy and receive, any documents of any person or employer.

"(b) In carrying out investigations under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply (other than with respect to an investigation carried out under section 2043(a)) to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the Secretary's subpoena.

"(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter (other than an investigation carried out under section 2043(a)). The district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court (other than with respect to an investigation carried out under section 2043(a)).

"SUBCHAPTER V—MISCELLANEOUS PROVISIONS

"§ 2061. Regulations

"(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

"(b)(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to the Federal Government as employer. Such regulations shall be consistent with the regulations pertaining to the States and private employers, except that employees of the Federal Government may be given greater or additional rights. Nothing in this subsection constitutes authority for the Director to prescribe any matter for which any regulation may be prescribed under paragraph (2).

"(2) Regulations may be prescribed—

"(A) by the Merit Systems Protection Board to carry out its responsibilities under this chapter; and

"(B) by the Office of Special Counsel to carry out its responsibilities under this chapter.

"(3) It is the sense of Congress that the Federal Government should be a model employer with respect to the requirements of this chapter.

"§ 2062. Reports

"The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 2043(c) and no later than February 1, 1992, and each February 1 thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

"(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.

"(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 2044(c) or 2043(c), respectively, during such fiscal year.

"(3) The number of pleadings filed by the Attorney General pursuant to section 2044(e) during such fiscal year.

"(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).

"(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

"(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

"§ 2063. Severability provision

"If any provision of this chapter, or the application of such provision to any person or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it held invalid, shall not be affected thereby.".

SEC. 3. CONFORMING AMENDMENTS.

(a) Amendments to Title 38.—(1) Section 3103A(b)(3) of title 38, United States Code, is amended—

(A) by striking out "or" at the end of clause (E);

(B) by striking out the period at the end of clause (F) and inserting in lieu thereof "; or"; and

(C) by adding at the end thereof the following new clause:

"(G) to reemployment benefits under chapter 43 of this title.".

(2) The table of parts preceding part I of such title is amended by striking out the item for chapter 43 and inserting in lieu thereof the following:

"43. Employment and Reemployment Rights of Members of the Uniformed Services................. 2021".

(3) The table of chapters at the beginning of part III of such title is amended by striking out the item for chapter 43 and inserting in lieu thereof the following:

"43. Employment and Reemployment Rights of Members of the Uniformed Services.................. 2021".

(b) Amendments to Title 5.—Section 1204(a)(1) of title 5, United States Code, is amended by striking out "section 2023" and inserting in lieu thereof "chapter 43".

(2) Subchapter II of chapter 35 of such title is repealed.

(3) The table of sections for chapter 35 of such title is amended by striking out the items relating to subchapter II.

(c) Amendment to Title 10.—Section 706(c)(1) of title 10, United States Code, is amended by striking out "section 2021" and inserting in lieu thereof "chapter 43".

(d) Amendments to Title 28.—Section 631 of title 28, United States Code, is amended—

(1) by striking out subsection (j);

(2) by redesignating subsections (k) and (l) as subsections (j) and (k), respectively; and

(3) in subsection (j), as redesignated by paragraph (2), by striking out "under the terms of" and all that follows through "section," the first place it appears and inserting in lieu thereof "under chapter 43 of title 38,".

SEC. 4. EFFECTIVE DATES.

(a) Reemployment.—(1) Except as provided elsewhere, the amendments made by this Act shall be effective with respect to reemployments initiated on or after the first day after the 60-day period beginning on the date of the enactment of this Act.

(2) The provisions of chapter 43 of title 38, United States Code, in effect on the day before such date of enactment shall continue to apply to reemployments initiated before the end of such 60-day period.

(3) In determining the number of years of service that may not be exceeded in an employee-employer relationship with respect to which a person seeks reemployment under chapter 43 of title 38, United States Code, as in effect before or after the date of the enactment of this Act, there shall be included all years of service without regard to whether the periods of service occurred before or after such date of enactment unless the period of service is exempted by the chapter 43 that is applicable, as provided in paragraphs (1) and (2), to the reemployment concerned.

(b) Discrimination.—The provisions of section 2031 of title 38, United States Code, as provided in the amendments made by this Act, and the provisions of subchapters III and IV of chapter 43 of such title, as provided in the amendments made by this Act, that are necessary for the implementation of such section 2031 shall become effective on the date of the enactment of this Act.

(c) Insurance.—(1) Except as provided in paragraph (2), the provisions of section 2034(c) of title 38, United States Code, as provided in the amendments made by this Act, concerning insurance coverage shall become effective on the date of enactment of this Act.

(2) A person who entered active service in the uniformed services after August 1, 1990, and before the date of the enactment of this Act, or a family member or personal representative of such person, may, after the date of the enactment of this Act, elect to reinstate or continue insurance coverage as provided in such section 2034. If such an election is made, insurance coverage may remain in effect for the remaining portion of the 18-month period that began on the date of such person's separation from civilian employment.

(d) Disability.—(1) Section 2033(a)(3) of chapter 43 of title 38, United States Code, as provided in the amendments made by this Act, shall apply to reemployments initiated on or after August 1, 1990.

(2) Effective as of August 1, 1990, section 2027 of title 38, United States Code, as in effect on the date of the enactment of this Act, is hereby repealed.

(e) Reports.—The reports made by the Secretary of Labor pursuant to section 2062 of title 38, United States Code, as provided in the amendments made by this Act, shall be made with respect to cases pertaining to chapter 43 of such title without regard to whether a case originated under such chapter before, on, or after the date of the enactment of this Act.

(f) Previous Actions.—Except as otherwise provided, the amendments made by this Act do not affect reemployments that were initiated, rights, benefits, and duties that matured, penalties that were incurred, and proceedings that were begun before the end of the 60-day period referred to in subsection (a).

SEC. 5. TECHNICAL AMENDMENT.

Section 9(d) of Public Law 102-16 is amended by striking out "Act" the first place it appears and inserting in lieu thereof "section".

INTRODUCTION

On March 7, 1991, a hearing was held by the Subcommittee on Education, Training, and Employment to review the veterans' reemployment rights provisions contained in Chapter 43, title 38, United States Code. Witnesses at this hearing included the Honorable Stephen M. Duncan, Assistant Secretary of Defense for Reserve Affairs, accompanied by Mr. Frank Rush, Acting Deputy Assistant Secretary of Defense for Reserve Affairs (Manpower and Personnel); the Honorable Thomas E. Collins III, Assistant Secretary of Labor for Veterans' Employment and Training, accompanied by Mr. John Depenbrock, Associate Solicitor for Labor-Management Laws; Mr. Stuart Schiffer, Deputy Assistant Attorney General for the Civil Division, Department of Justice; the Honorable Bill R. Phillips, Deputy Director, Office of Personnel Management; and representatives of the Naval Reserve Association, the Enlisted Association of the National Guard, the National Guard Association of the U.S., Reserve Officers Association, The American Legion, and Disabled American Veterans.

Subsequent to the March 7th hearing, H.R. 1578, the "Uniformed Services Employment and Reemployment Rights Act of 1991," was introduced by the Honorable Timothy J. Penny, Chairman of the Subcommittee. Original cosponsors include the Honorable Christopher Smith, Ranking Minority Member of the Subcommittee, the Honorable G. V. (Sonny) Montgomery, Chairman of the Full Committee, and the Honorable Bob Stump, Ranking Minority Member of the Full Committee. Other cosponsors include Committee members Lane Evans, Jim Slattery, Claude Harris, Owen Pickett, John Paul Hammerschmidt, and Dan Burton. Additional cosponsors include Ed Jenkins, W. G. (Bill) Hefner, Charles Stenholm, L. F. Payne, Mike Parker, Bill Richardson and James Inhofe.

On April 11, 1991, the Full Committee approved H.R. 1578, as amended, and ordered the measure reported to the House.

SUMMARY OF MAJOR PROVISIONS OF H.R. 1578, AS REPORTED

The reported bill would:

1. Supply statutory definitions for terms used in the new Chapter 43.

2. Prohibit discrimination or acts of reprisal against an employee or applicant for employment because of a past, current, or future military obligation.

3. Provide that reemployment rights protection shall apply to an individual if such person's period of service, with respect to the employer relationship for which a person seeks reemployment, does not, with certain exceptions, exceed five years.

4. Require an individual to report for reemployment within certain time limits based on the length of time absent from employment.

5. Clarify and reaffirm that the timing, frequency, and duration of a person's training or service, or the nature of such training or service in the uniformed services, shall not be a basis for denying employment or reemployment protection so long as the training or

service does not exceed certain limitations and, when possible, the servicemember shall provide notice to his or her employer that the person will be absent from employment because of military commitments.

6. Reaffirm that a protected individual is generally entitled to reemployment in the same position which the person would have attained if he or she had been continuously employed.

7. Require an employer to make reasonable efforts to qualify or requalify a protected returning individual for an appropriate position.

8. Require an employer to make reasonable efforts to accommodate the service-connected disability of a protected person.

9. Reaffirm that a person reemployed under chapter 43 is entitled to the seniority, and other rights and benefits determined by seniority, that the individual would have attained if the person had remained continuously employed.

10. Provide that a protected person would, at the person's request, continue to be covered by employer-provided insurance for up to 31 days at the employer's expense and up to 18 months at the person's expense, unless the employer chooses to fund the entire cost.

11. Provide that, in the case of employer-sponsored health benefits, no exclusion from coverage or waiting period can be imposed for a non-service-connected physical condition of covered persons which developed before or during military service.

12. Require an individual, except when it is impossible or unreasonable, to give verbal or written advance notice to an employer regarding an anticipated absence due to military service.

13. Require the Secretary of Labor, through the Veterans' Employment and Training Service, to provide assistance in obtaining employment or reemployment to any person entitled to rights or benefits under Chapter 43.

14. Require that federal employees be provided representation by the Office of Special Counsel before the Merit Systems Protection Board when necessary to enforce reemployment rights with the Federal Government.

15. Provide for the discretionary assessment of a civil penalty of not more than $25,000 against any employer who willfully violates the Act's requirements.

16. Authorize the Secretary of Labor to subpoena documents and witnesses in relation to the investigation of cases under chapter 43.

17. Require the Secretary of Labor to transmit to the Congress an annual report concerning cases related to Chapter 43.

BACKGROUND

The Veterans' Reemployment Rights (VRR) provisions of Federal law, which safeguard employment and reemployment rights in civilian employment of members of the uniformed services, have been in effect for over fifty years. Although the law has effectively served the interests of veterans, members of the Reserve Components, the Armed Forces and employers, the current statute is complex, at times ambiguous, and in some instances does not reflect court interpretations made through the years. Both members of the uniformed services and employers have, on occasion, expressed confusion and uncertainty regarding their rights and responsibilities under current chapter 43, title 38, United States Code. Additionally, the implementation of the Total Force policy, under which members of the Reserve Components have been tasked with greater responsibility for every phase of military preparedness, has rendered the current structure of the reemployment rights provisions somewhat antiquated and cumbersome. Accordingly, the primary goals of the Committee, when undertaking the revision of chapter 43, were to clarify, simplify, and, where necessary, to strengthen the existing veterans' employment and reemployment rights provisions.

For example, because of increased responsibilities, Selected Reservists are sometimes required to train for extended periods. Additionally, because of the diverse designations of the type of training or duty for which servicemembers have been called, uncertainty regarding individuals' eligibility for reemployment rights has arisen in some cases. To clarify this uncertainty, protections and responsibilities imposed under H.R. 1578, as amended, would be based on actual time spent away from the place of employment and not on the designation of the service or type of training performed. Moreover, new section 2023 would define significant terms used throughout the Act in an effort to avoid misinterpretation of those terms. The bar to employment-related discrimination against members of the uniformed services included in the Committee bill reaffirms the actions taken by Congress in 1968 and 1986 to make such practices violative of the law. Further, under current law, only members of the Reserve Components leaving for active duty for training or inactive duty training are required to provide notice to their employers that they would be absent from employment because of military service. Under the Committee bill, all persons leaving their civilian jobs to enter military service would be required to provide notice, except when doing so is impossible or unreasonable. These and other provisions which clarify, simplify or strengthen current law are discussed in more detail in the following section of the Committee report.

It is important to note that, for over three years, an executive branch task force on veterans' reemployment rights, which included representatives of the Departments of Labor, Defense, and Justice, as well as the Office of Personnel Management, worked on the development of a revision of chapter 43. On March 5, 1991, a proposed bill which embodied the task force recommendations was transmitted to Congress by the Administration. The Committee bill, H.R. 1578, as amended, is, with some exceptions, similar to and largely derived from the Administration draft entitled the "Uniformed Services Employment Rights Act of 1991." The Administration's proposal and accompanying sectional analysis are included in the Departmental Views section later in this report. The Committee worked closely with the federal agency representatives who served on the reemployment rights task force and is grateful to those individuals for their invaluable guidance and assistance.

The Committee's most notable departure from the Administration's proposed bill relates to section 2022(e) of the bill. This section would have established a rebuttable presumption of reasonableness regarding the ~~timing,~~ frequency, and duration of an individual's military service or training. It is the Committee's view that current law does not allow for a "reasonableness" test or requirement, and that position is reaffirmed in section 2032(i) of the Committee bill. The Committee believes employers and the courts should not be in the position of "second-guessing" Armed Forces officials regarding the military necessity of service. At the same time, the Committee expects the Department of Defense to establish administrative procedures as necessary to ensure that when a conflict arises between the obligation of a member of the uniformed services and the needs of an employer that the employer, when possible, would have the opportunity to request that the training or service be rescheduled. The Committee intends that the determination of the military authorities be final but that efforts be made to provide flexibility in training and service schedules when appropriate.

The Administration proposal would have required the Secretary of Labor and the Director of the Office of Personnel Management to prescribe regulations implementing the provisions of chapter 43 and, in some instances, would have extended to the Secretary and the Director broad latitude to expand or amend certain sections by regulation. In contrast, the Committee bill would authorize the Secretary and the Director to implement regulations, but policy is explicitly stated in the language of H.R. 1578, as reported.

The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977).

DISCUSSION AND ANALYSIS

Section 1. Short Title.

Section 1 of H.R. 1578, as amended, would provide that this Act may be cited as the "Uniformed Services Employment and Reemployment Rights Act of 1991."

Section 2. Employment and Reemployment Rights of Members of the Uniformed Services.

Section 2 of the Committee bill would effectively replace the current employment and reemployment rights provisions found at 38 U.S.C. 2021-27. Current law would be in effect, however, for all applications for employment, reemployment or other actions protected under those provisions prior to the 61st day following enactment of this Act, unless otherwise noted. See section 4 of the reported bill. The following is a discussion of the provisions of chapter 43, title 38, United States Code, as amended by H.R. 1578.

SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

Section 2021. Purposes.

Section 2021 would state the purposes of the Act. These are the same purposes that were the basis of the enactment of the initial provisions in 1940 and have been the basis for all subsequent amendments and recodifications.

Section 2022. Relation to other law and plans or agreements.

Section 2022(a) would reaffirm that, to the extent that a Federal or state law or employer plan or practice provides greater rights than those provided under the Committee bill, those greater rights would not be preempted by chapter 43.

Section 2022 (b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See Peel* v. *Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979); *Cronin* v. *Police Dept. of City of New York*, 675 F. Supp. 847 (S.D. N.Y. 1987) and *Fishgold, supra*, 328 U.S. at 285, which provides that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. *See McKinney* v. *Missouri—K-T R.Co.*, 357 U.S. 265, 270 (1958); *Beckley* v. *Lipe-Rollway Corp.*, 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See Kidder* v. *Eastern Airlines, Inc.*, 469 F. Supp. 1060, 1064–65 (S.D. Fla. 1978). The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in being may be waived. An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.

Section 2023. Definitions.

Section 2023 would define terms which have been undefined in previous reemployment statutes. This section would also define terms that are new.

Section 2023(1) would define "Attorney General." While the Attorney General of the United States retains full authority to enforce the provisions of this Act in Federal Court, the cases are usually handled by the United States Attorney for the appropriate district, often with the assistance of Department of Labor attorneys.

This system has worked well in the past and should continue to be utilized in the future.

Section 2023(2) would define "benefit, benefit of employment or employment related rights and benefits." These are the rights, incident to employment, which are protected under chapter 43. These rights are broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service. The list of benefits is illustrative and not intended to be all inclusive.

Section 2023(3) would define "completion of service." Under current law, there are two criteria for separation from military service that are protected, "satisfactory completion of service" and a discharge "under honorable conditions." This section would make completion of a period of service "under honorable conditions" the only criteria and would do so by listing those separations or discharges which would *not* be "under honorable conditions." All other discharges, whether or not denominated as being under honorable conditions, would meet the definition, including uncharacterized or entry-level separations.

The characterization of service applied by the uniformed service (usually on the Department of Defense Form 214) is intended to be binding on both the veteran and the employer and no other characterization or notation in the Form 214 or any other document shall be relevant. *See Hall* v. *Chicago & Eastern Ill. R. Co.*, 240 F. Supp. 797, 800 (N.D. Ill. 1964). An upgrade of an "other than honorable" discharge shall give rise to reemployment rights only if the upgrade is retroactive and only if the veteran otherwise meets the eligibility criteria, including having made a timely application for reemployment both after the original discharge and after the upgrade. *See Robertson* v. *Richmond, Fredericksburg & Potomac R. Co.*, 178 F. Supp. 734 (E.D. Va. 1959).

Section 2023(4) would define "employer" and is to be broadly construed. It includes not only what may be considered a "traditional" single employer relationship, but also those under which a servicemember works for several employers in industries such as construction, longshoring, etc. or is referred to employment. *See, e.g., Adams* v. *Mobile County Personnel Board,* 115 LRRM 2936 (S.D. Ala. 1982). This definition would also include entities to which certain employment-related responsibilities have been delegated, such as pension funds. *See Imel* v. *Laborers Pension Trust Fund*, 904 F.2d 1327 (9th Cir.), cert. denied, 111 S.Ct. 343 (1990); *Akers* v. *Arnett*, 597 F. Supp. 557 (S.D. Tex. 1983), *aff'd*, 748 F.2d 283 (5th Cir. 1984). This section would, as does current law, apply to all employers regardless of the size of the employer or the number of employees.

The issue of independent contractor versus employee should be treated the same as under the Fair Labor Standards Act. *See Brock* v. *Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987).

This provision would also have the effect of placing liability on a successor in interest, as is true under current law. The Committee intends that the multi-factor analysis utilized by the Court in *Leib* v. *Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991) is to be the model for successor in interest issues. However, the successor's notice or awareness of a reemployment rights claim at the time of merger or acquisition should not be a factor in this analysis. In actual practice, it is possible that the successor would not have notice that one or more employees are absent from employment because of military responsibilities and a returning serviceperson should not be penalized because of that lack of notice.

Section 2023(4)(c) would provide that the employer of a National Guard technician shall be the Adjutant General of the State where the technician is employed. Because of the mix of State and Federal attributes of National Guard technicians, these persons have had difficulty enforcing their rights under the existing reemployment statute. The purpose of this provision is to clarify that National Guard technicians are to be considered to be State employees for purposes of chapter 43, but not necessarily for any other purpose except as otherwise provided by law.

Section 2023(5) would define "Federal Government." It is the Committee's intent that the definition of "agency in the executive branch" include the United States Postal Service and also non-appropriated fund instrumentalities of the United States, e.g., military exchanges and officers' clubs. The intent is to give those employees the same reemployment rights as those extended to other Federal employees.

Section 2023(6) would define "notice." The Committee wishes to make it clear that the new requirement that all employees leaving their civilian jobs give notice of that intention, regardless of the nature of the military activity, is satisfied by any written or verbal notice made to the employer or a responsible representative of the employer. The notice may be given by the individual employee or by the uniformed service.

Section 2023(7) defines "other than temporary position." The intent of this definition is to utilize the concepts formulated by the court in *Stevens* v. *Tennessee Valley Authority*, 687 F.2d 158 (6th Cir. 1982).

Section 2023(8) would define "qualified." This term is intended to ensure that, before a returning serviceperson can be found not to be qualified for a particular position, the employer must prove that, after reasonable efforts have been undertaken to help the person become qualified, he or she cannot perform the essential tasks of the position, not necessarily all of the tasks.

Section 2023(9) would define "reasonable efforts." Under H.R. 1578, as amended, reasonable efforts would be required to help qualify otherwise unqualified returning servicepersons, whether unqualified by reason of a service-connected disability or because of technological advances, so long as such efforts did not create undue hardships on the employer. These efforts are to include, but are not limited to, training or retraining in the workplace, physical adjustments, modification of equipment or provision of mechanical aids to assist in operating equipment.

Section 2023(10) would define "Secretary" to mean the Secretary of Labor or a designated representative, unless otherwise stated.

Section 2023(11) would define "seniority" to mean longevity in employment, including the period of employment prior to military service, the time between leaving the job and entering military service, the period of military service and the time between discharge or release from military service and reemployment.

Section 2023(12) would define "service in the Armed Forces" to include all types of military training or service, including active duty, active duty for training, initial active duty for training and inactive duty training, etc. Under current law, entitlements and eligibility criteria for reemployment rights differ based upon categories of military training or duty. It is the Committee's view that those distinctions are no longer relevant or appropriate and only lead to confusion and anomalous results in some cases.

Section 2023(13) would define "State" to include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States, together with the political subdivisions of each.

Section 2023(14) would define "uniformed services" to include all five armed services and their reserve components. In addition, the commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration would be added to the categories of beneficiaries of the reemployment rights statute.

Although the Merchant Marine is not a traditional uniformed service, this definition would provide that members of the Merchant Marine shall be accorded rights and benefits under chapter 43 as though the Merchant Marine were a uniformed service, when deemed necessary by the Secretary of Defense. Treating the Merchant Marine as though it were a uniformed service for purposes of this Act are not intended to affect rights of Merchant Marine members for any other purpose.

This section would also give the President the authority to designate any other category of persons a "uniformed service" during time of war or national emergency.

SUBCHAPTER II—PROHIBITIONS, RIGHTS, AND LIMITATIONS

Section 2031. Discrimination against members of the uniformed services and acts of reprisal prohibited.

Current law protects Reserve and National Guard personnel from discharge or discrimination based on their military obligations. Section 2031(a) would reenact the current prohibition against discrimination which protects all persons from discrimination because of a past, current, or future military obligation. Protections include discrimination against applicants for employment, (*see Beattie* v. *The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join reserve or National Guard units (*see Boyle* v. *Burke*, 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See*

Trulson v. *Trane Co.*, 738 F.2d 770, 775 (7th Cir. 1984). The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced.

In this latter situation, if the employee is involuntarily discharged prior to leaving for military service, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not await completion of the service.

Section 2031(b) is a new provision which would make explicit that the anti-retaliation provisions contained in the reported bill apply to persons who file a complaint, either with his or her employer (*see Henry* v. *Anderson County, Tenn.*, 522 F. Supp. 1112, 1115 (E.D. Tenn. 1981)), or with a governmental agency, as well as to persons who testify in any proceeding under chapter 43, even if that person was not the subject of the proceeding. Additionally protected would be persons who exercise any right under chapter 43, such as giving notice of impending military service, or who assist or otherwise participate in an investigation under chapter 43, even if that person was not the subject of the investigation. Accordingly, a person protected under this section need not be a member of the uniformed services.

Section 2031(c) would establish that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current 38 U.S.C. 2021(b)(3) in 1968. *See Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services*, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

This standard and burden of proof would be applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer* v. *Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

Section 2032. Rights of persons absent from employment to serve in the uniformed services; limits on rights.

Section 2032(a) would provide an unqualified right to reemployment to persons who leave other than temporary positions to serve on any type of military duty, whether voluntary or involuntary. The only exception would be the provision in the Committee bill, which reflects current law, which provides that the employer need not reemploy the person if the employer's circumstances have so changed as to make it impossible or unreasonable to reemploy. This very limited exception, which is in the nature of an affirmative defense, and for which the employer has the burden of proof (*see Watkins Motor Lines, Inc.* v. *deGalliford*, 167 F.2d 274, 275 (5th Cir. 1948); *Davis* v. *Halifax Cty. Sch. System*, 508 F. Supp. 966, 969 (E.D. N.C. 1981)), is only applicable "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran." *Davis, supra*, 508 F. Supp. at 968. "It is also not sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application," *Davis, supra. See also Fitz* v. *Bd. of Education of Port Huron*, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985) *aff'd* 802 F.2d 457 (6th Cir. 1986); *Anthony* v. *Basic American Foods*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin* v. *Lincoln St. Louis*, 702 F.2d 698, 709 (8th Cir. 1983).

Section 2032(b) is a major revision of current chapter 43. Under existing sections 2024(a) and (b) of title 38, U.S.C., a person is permitted to remain on active duty for up to four years and still have reemployment rights. However, under section 2024(a) of title 38, voluntary enlistees are permitted to remain on active duty for up to five years if the period beyond four years is an extension "at the request and for the convenience of the Federal Government." Under proposed section 2032(b) of chapter 43, the limit on duration would generally be five years. It is the Committee's view that this approach would clarify and simplify the current law's confusing "four plus one" limitation.

Additionally, under current law service limitations apply only to active duty service. Thus, an employee who serves four years on active duty, returns to his or her pre-service employer, trains one weekend a month and two weeks in the summer as a National Guardsman for several years and then enters upon a three-year Active Guard/Reserve tour of duty, would have reemployment rights with his or her employer upon release from that AGR tour of duty.

Because of the blurring of the distinctions between the types of military service, e.g., active duty vs. active duty for training, it is no longer rational or equitable to make rights and obligations under chapter 43 dependent on these artificially denominated types of service. Rather, under the reported bill, almost all types of service would be cumulatively considered toward the service limits, an approach the Committee considers appropriate because employment and reemployment rights are intended to protect non-career servicepersons. *See Smith* v. *Missouri-Pacific R. Co.*, 313 F.2d 676, 682–683 (8th Cir. 1963). Accordingly, H.R. 1578, as amended, would establish a basic five-year limitation on total military service during the period of employment with the employer against whom reemployment rights are asserted. *See Hall* v. *Chicago & Eastern Ill. R. Co.*, 240 F. Supp. 797, 800 (N.D. Ill. 1964).

In order, however, to ensure that the Armed Forces have an adequate supply of trained personnel, certain exceptions to the five years basic limitation would be established by the Committee bill. Section 2032(b)(1) would provide that the cumulative period of service may exceed five years if the additional time is necessary to complete an initial obligated service requirement. Because of the very high training costs for some military specialties, such as the Navy's nuclear power program, the services sometimes impose initial active service obligations exceeding five years upon persons serving in those specialties. The intent of this section is to ensure that a person leaving active duty upon completion of his or her initial active service obligation should have reemployment rights even if his or her period of continuous active service exceeds five years.

Section 2032(b)(2) would provide that the cumulative period of service may exceed five years if the person was unable to obtain orders releasing him or her from active service through no fault of such person. This provision is similar to the existing reemployment statute.

During time of war or national emergency, a person may be involuntarily retained on active duty beyond his or her expiration of date of obligated active service, which was the case for some persons in connection with Operation Desert Shield/Storm. Additionally, there are other circumstances in which a person may be retained on active duty beyond his or her date of obligated active service. For example, the obligated active service date of a member of the Navy or Marine Corps serving on a vessel may be extended until the vessel returns to the United States if the obligated active service date comes while the vessel is at sea. *See* 10 U.S.C. 5540. As another example, a person may be retained on active duty beyond his or her obligated active service date if that individual is suspected of a military criminal offense. *See* 10 U.S.C. 802(a)(1). If the member is retained on active duty for court-marital and then acquitted, or if military authorities later decide not to proceed with the charges, the Committee intends that it shall be irrebuttably presumed that the member's inability to obtain orders releasing him or her from active service on his or her obligated active service date was through no fault of such member.

Section 2032(b)(3) would exclude statutorily mandated National Guard and Reserve training requirements from the cumulative five-year limit. The cited sections of titles 10 and 32 of the United States Code generally require 14 or 15 days of full-time duty for training each year and 48 inactive-duty training periods (typically one weekend a month for drills) to be performed each year. Also excluded from the five-year limit would be additional training requirements determined by the Secretary of the service concerned to be necessary to meet individual professional development or skill needs. Absent these exclusions from the five-year cumulative limit, National Guard and Reserve members could be subject to loss of reemployment protections simply as the result of their completion of mandatory training or other training required to meet military needs.

Section 2032(b)(4) would exclude service performed on active duty (other than for training) during periods of war or national emergency or in support of critical operational missions as determined by the Secretary concerned as follows:

Subparagraph (A) would exclude service performed following active duty subject to the specific provisions of title 10, United States Code, enumerated in this subparagraph. These authorities provide for the involuntary order to active duty or involuntary retention on active duty of members of the Armed Forces in certain emergency or national security related situations.

Subparagraph (B) would provide a more general exclusion for service performed on active duty (other than for training) during a war or national emergency. This exclusion would cover active duty service during such a period even if none of the specific statutory authorities named in subparagraph (A) were invoked. An example would be an order to active duty during a war or national emergency under a law or joint resolution related to a specific crisis situation.

Subparagraph (C) would provide an exclusion from the five year cumulative period for service on active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under the Presidential authority to order members of the Selected Reserve to active duty involuntarily under other than war or national emergency conditions. Section 673b of title 10, United States Code, currently authorizes the President to order up to 200,000 Reservists to active duty for up to 180 days. This subparagraph is intended to treat volunteers supporting such missions the same as those involuntarily ordered to serve. The Secretary of the service concerned would determine which missions would be protected under this subparagraph.

Subparagraph (D) would provide an exclusion from the five year cumulative limit for members ordered to active duty in support of a critical mission, or requirement of the uniformed services. This provision would allow the Secretary of the service concerned to designate volunteers' serving in support of operation missions during a period where no involuntary recall or call up was in effect. Recent examples would be Reservists who served on active duty in support of Operation Just Cause or Operation Urgent Fury.

Subparagraph (E) would provide an exclusion from the five year cumulative limit for members of the National Guard called into Federal Service by the President to suppress an insurrection or interference with State and Federal Law, to execute the laws of the United States, or to repel an invasion.

Section 2032(b)(5) would authorize the Secretary of Labor, in consultation with the Secretary of Defense, to promulgate regulations to establish other categories of service to be excluded from the five year limit. It is the Committee's intent that this authority be used sparingly to deal with unanticipated circumstances or changing conditions.

Under current law, the deadline for returning servicemembers to report to their preservice employer for reemployment depends on the type or category of service. Under proposed section 2032(c), the time limits for applying for reemployment would depend on the length or duration of the military service from which the serviceperson is being discharged or released. This is based on the same rationale as outlined above relative to service limitations. Application for reemployment would be required to be made, either in writing or verbally, to the employer or to a representative of the employer who has either the authority to act on the application or who is in a position to forward the request for reemployment to someone who has the authority. *See Shadle* v. *Superwood Corp.*, 858 F.2d 437 (8th Cir. 1988).

Relative to military service of less than 31 days, servicemembers would ordinarily be required to report for work at the beginning of the first regularly scheduled working period on the next working day after release from service. An employee, however, must be allowed a reasonable time to arrive back at his or her residence, a reasonable time to rest, if appropriate, and a reasonable time to travel to the place of employment. For example, an employer could not expect a reservist who returns home from weekend duty at 10:00 p.m. to report to work at 12:30 a.m. that night, even if it is the beginning of the next regularly scheduled working period the next day. The Committee believes that an employee must be in a position to arrive at work rested in order to perform safely at work.

For individuals performing military service of 31–180 days, a 14-day reporting deadline would be established, and a 90-day reporting deadline would be established for those performing military service of more than 180 days. These deadlines would also begin to run upon the employee's safe arrival at his or her home.

Section 2032(d)(1) would provide that these reporting deadlines would be extended by up to one year for a person who is hospitalized or is convalescing from service-connected illness or injury.

Section 2032(d)(2) would provide an extension of up to two years for a special disabled veteran whose disability significantly impairs the individual's ability to work. In order to minimize disruption and inconvenience to the employer, this section would further require that the disabled servicemember notify his or her employer of the person's situation and keep the employer informed of progress in rehabilitation.

Section 2032(d)(3) would extend the deadline to report for reemployment "by the minimum time required to accommodate the circumstances beyond such person's control . . . " An automobile accident or other transportation-related delay would be an example of a "circumstance beyond such person's control."

Section 2032(e) would avoid the potential inflexibility of the reporting deadlines by establishing that absences beyond the deadline would not necessarily deprive an employee of all reemployment rights, but that he or she be would be subject to the employer's rules and practices (including deviations from rules) dealing with unexcused absences.

Section 2032(f) would require that, when reporting for reemployment, a returning servicemember, if requested, shall provide whatever documentation is available to establish that he or she has not exceeded the service limitations of section 2032(b) and has been discharged or released from military service under honorable conditions. To the extent that such documentation is not in existence or not readily available, an employer cannot deny reinstatement on the basis of a lack of such documentation. It is, however, incumbent on the employee to obtain the documentation, if requested, as soon as it is in existence or available. If the documentation subsequently obtained fails to show that the person is eligible for coverage, there would be no entitlement to reemployment rights.

Section 2032(g) would provide that a person returning from service in the uniformed services to Federal employment could not displace an employee with a superior claim under the Veterans' Preference Act, such as a disabled veteran. A returning veteran who finds his or her preservice position occupied by another veteran with a superior claim under the Veterans Preference Act would have reemployment rights in some other position.

Section 2032(h) would require that, where military service might result in additional pension liability, the administrator of a multiemployer pension plan be notified that a contributing employer has reemployed a veteran under chapter 43. Such a notification would provide the plan the opportunity to take whatever steps may be required to protect its interests. Unlike administrators of single-employer pension plans, administrators of multiemployer plans are generally not in a position to be aware of the fact that a contributing employer has reemployed a person who may have a pension claim arising from a period of military service.

Section 2032(i) results from the multiplicity of lawsuits arising out of extended reserve and National Guard "training" tours of duty, particularly with reference to existing section 2024(d) of title 38, U.S.C. A number of cases have arisen from application of the judicially created "reasonableness" requirement to military leave requests. *See St. Vincent's Hospital* v. *King*, 901 F.2d 1068 (11th Cir. 1990), cert. granted, No. 90-889, February 19, 1991; *Eidukonis* v. *Southeastern Pa. Transp. Authority*, 873 F.2d 688 (3rd Cir. 1989); Gulf States Paper *Corp.* v. *Ingram*, 811 F.2d 1464 (11th Cir. 1987); *Lemmon* v. *Santa Cruz County*, Cal. 686 F. Supp. 797 (N.D. Cal. 1988). Existing section 2024(d) provides no limit on the nature, timing, frequency or duration of any one period of military training, and the "reasonableness" requirement is contrary to the section's intent. The Committee intends that no "reasonableness" requirement or test be applied to proposed section 2032(i), which prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 2032(b) and the servicemember has complied with the notice requirement under section 2034(d).

The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of the appropriate military authorities (*see Hilliard* v. *New Jersey Army National Guard*, 527 F. Supp. 405, 411-412 (D. N.J. 1981)), and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the servicemember to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.

Section 2033. Position to which entitled upon reemployment.

Section 2033, in conformance with the principle that rights, benefits and obligations would no longer be based on the type or nature of military service or training, but rather on the length of service or training, would require that the position to which returning servicepersons shall be reinstated would be determined by the length of service or training.

Section 2033(a)(1), which would apply to periods of service of less than 181 days, would require that a protected individual be reemployed in the "escalator" position. The "escalator" concept was first enunciated by the Supreme Court in Fishgold v Sullivan Drydock & Repair Corp., 328 U.S. 275, 284–285 (1946) wherein it was stated that the returning serviceperson "steps back on [the seniority escalator] at the precise point he [or she] would have occupied had he [or she] kept his [or her] position continuously during the war."

Thus, whatever position the returning serviceperson would have attained, with reasonable certainty (*see Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 180 (1964)), but for the absence for military service, would be the position guaranteed upon return. This could be the same position or a higher, lower, or lateral (e.g., a transfer) position or even possibly layoff or severance status (*see Derepkowski* v. *Smith-Lee Co., Inc.*, 371 F. Supp. 1071 (E.D. Wis. 1974)), depending on what has happened to the employment situation in the servicemember's absence.

The Committee intends to affirm the interpretation of "reasonable certainty" as "a high probability" (*see Schilz* v. *City of Taylor, Mich.*, 825 F.2d 944, 946 (6th Cir. 1987)), and has sometimes been expressed in percentages. *See Montgomery* v. *Southern Electric Steel Co.*, 410 F.2d 611, 613 (5th Cir. 1969) (90% success of probationary employees becoming permanent meets reasonable certainty test); *Pomrening* v. *United Air Lines, Inc.*, 448 F.2d 609, 615 (7th Cir. 1971) (86% pass rate of training class meets reasonable certainty test).

The claim that a returning serviceperson is not qualified for the "escalator" position must be proven by the employer and only after reasonable efforts by the employer to enable the serviceperson to become qualified have been undertaken.

Under Section 2033(a)(2), unlike the situation where a servicemember has served for less than 181 days and is entitled strictly to the "escalator" position, when the time in service is 181 days or more, the employer would have the option, as is the case under current law, of reemploying that person in the "escalator" position or one of like seniority, status and pay. Since seniority and pay are easily determined, the critical factor for determining equivalency is status.

Although not the subject of frequent court decisions, courts have construed status to include "opportunities for advancement, general working conditions, job location, shift assignment, [and], rank and responsibility." *Monday* v. *Adams Packing Assoc., Inc.*, 85 LRRM 2341, 2343 (M.D. Fla. 1973). A reinstatement offer in another city is particularly violative of like status (*see Armstrong* v. *Cleaner Services, Inc.*, 79 LRRM 2921, 2923 (M.D. Tenn. 1972)), as would be reinstatement in a position which does not allow for the use of specialized skills in a unique situation.

Section 2033(a)(3) would address the issue of the position to be granted a serviceperson disabled while in military service, regardless of length of service, who is not qualified for the "escalator" position after reasonable efforts to accommodate the disability. The obligation of the employer, after it is clear that the "escalator" position is not available, would be to reemploy the returning servicemember in an equivalent position in terms of seniority, status and pay for which the person is qualified or can become qualified with reasonable efforts by the employer. If no such position exists, the nearest approximate position in terms of seniority, status and pay would be required to be found. If a position other than the "escalator" position is offered for reemployment to a returning disabled servicemember, full company seniority for all purposes is always to be accorded the disabled serviceperson, regardless of whether seniority follows an employee under other circumstances. *See Hembree* v. *Georgia Power Co.*, 637 F.2d 423 (5th Cir. 1981); *Ryan* v. *City of Philadelphia*, 559 F. Supp. 783 (E.D. Pa. 1983) *aff'd.* 732 F.2d 147 (3rd Cir. 1984).

Section 2033(a)(4) would require the reemployment of returning servicepersons who are not found qualified for their "escalator" positions for any reason other than disability, regardless of length of service, but who can qualify for a lesser position in terms of status and pay. This provision is primarily intended to deal with employees who return to technologically-advanced situations for which they cannot qualify, but who can perform in another position not necessarily in their "escalator" line.

Section 2033(b) is a restatement of 38 U.S.C. 2026 and the Committee intends that it be construed in a similar manner.

The provisions of section 2033 require prompt reinstatement. The Committee recognizes that what is prompt would depend on the circumstances of each case. However, reinstatement after weekend National Guard duty would obviously be the next working day, while reinstatement after five years on active duty may entail giving notice to an incumbent employee who may have to be "bumped." The Committee intends that any undue delay would be subject to a claim for lost wages.

Section 2034. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service.

Section 2034(a) would address the issue of the "escalator" principle as it applies to seniority and all rights and benefits which flow from seniority, calculated as if the person had never left employment. For example, in determining how much vacation (length of vacation) a servicemember is entitled to in the years following reinstatement, all time away from work (period between leaving the job and entering military service, period of military service, and period between discharge or release from military service and reemployment) would be required to be considered under this section. Thus, if vacations increase from one to two weeks after five years of company service, a serviceperson who worked for one year, served two years on active duty and has worked for two years after reemployment, would be entitled to two weeks vacation after these five years.

Section 2034(b) would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign with a promise of reemployment, is of no effect. *See Green* v. *Oktibbeha County Hospital*, 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders* v. *People Exp. Airlines, Inc.* 595 F. Supp. 1512, 1518 (D. N.J. 1984), *aff'd*, 770 F.2d 1078 (3d Cir. 1985).

Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever non-seniority related benefits are accorded other employees on non-military leaves of absence. *See, Winders, supra*. In contrast, benefits which are seniority based would not be limited to the treatment accorded employees on non-military leaves of absence but are to be accorded as if the servicemember had remained continuously employed.

The Committee intends to reaffirm that, to the extent that the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid. *See Waltermyer* v. *Aluminum Co. of America*, 804 F.2d 821 (3rd Cir. 1986).

The last sentence of this subsection would require the employee to pay his or her share of the cost of the continued benefit if that is a requirement for all other employees on non-military leave of absence. Insurance provided by an employer would, however, be treated as provided for in subsection (c).

Section 2034(c)(1) would provide that an employee on military leave shall, at his or her request, be covered by insurance provided by the employer for up to 18 months. This protection is similar to the continuation of health insurance under the so-called COBRA provisions of the Employee Retirement Income Security Act, 29 U.S.C. 1161, et seq., but applies to all individuals entering the uniformed services, without limiting qualifications such as the size of the person's employer. The individual employee may be required to pay the entire cost of continuing insurance coverage under Section 2034(c)(1), except in the case of persons serving periods of training or service for 30 or fewer days. In the case of these short tours, the employer is required to continue the insurance coverage, and the individual employee may only be required to pay the employee share, if any. Dependents of Reserve Component members are entitled to participate in the military health care system, including CHAMPUS, only when the member has been called to serve for at least 31 days. The Committee intends Section 2034(c)(1) to ensure that there be no gap in health insurance coverage of the reservist's family while the reservist is performing military training.

Section 2034(c)(2), which was first enacted as an amendment to current 38 U.S.C. 2021(b), effective March 18, 1991, is discussed in House Report 101-862 (October 13, 1990) at 4, which states that " . . . a reemployed servicemember is entitled to the health insurance benefits provided by an employer as if he or she had never been called to active duty [for training] and his or her employment had not been interrupted." The term "health benefits" is used generically in this section to include insurance plans, self-funded employer health plans (often administered by insurance companies), and health maintenance organizations, which provide health care directly to employees. Thus, upon reinstatement after military service, there should be no lapse in coverage, no waiting period, and no exclusion for pre-existing conditions, either for the employee or for his or her dependents. This provision would foreclose any reliance upon *Gentile* v. *United States Trucking Corp.*, 355 F. Supp. 960 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 752 (2d Cir. 1974), to reach a contrary result. The uniformed services themselves and the Department of Veterans Affairs will provide health care for service-connected disabilities.

Section 2034(d) would generally require an individual who leaves a civilian job for service in the uniformed services to give written or verbal notice of the forthcoming absence from employment to his or her employer. Under current law, only a member of the Selected Reserve must notify his or her employer before leaving work for active duty for training or inactive duty training. *See* 38 U.S.C. 2024(d). There is no current requirement to notify the employer before leaving for active duty or initial active duty for training. *See Winders* v. *People Exp. Airlines, Inc.*, 595 F. Supp. 1512, 1518 (D. N.J. 1984), *aff'd*, 770 F.2d 1078 (3rd Cir. 1985). This new notice requirement is effective 60 days after enactment of the Committee bill and applies only to persons who leave their jobs for military service after that date. The notice requirement of current section 2024(d) of title 38 would continue in effect during that 60-day period.

This section would also provide that the employee is excused from the requirement to give his or her employer advance notice if doing so is impossible or unreasonable because of military necessity or for other legitimate reasons. During the 1983 Grenada operation, for example, members of the National Guard and Reserve were called to active duty with little notice, and notifying their civilian employers was impossible for many individuals without jeopardizing military security. It is also made clear, in unambiguous language, that the determination as to whether military necessity precluded notification shall be made by the uniformed services and shall not be subject to judicial review.

The Committee believes that the employee should make every effort, when possible, to give timely notice. The issue of timely notice should be considered on a case-by-case basis. In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice given to the employer should be considered timely. On the other hand, last-minute notice, which could have been given earlier by the employee but was unjustifiably not given, and which causes severe disruption to the employer's operation, should be viewed unfavorably. Lack of a timely notification which does not result in harm to the employer should not be a sufficient basis to deny reemployment rights.

The Committee does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and transportation time back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. *See Fishgold*, *supra*, 328 U.S. at 284: "He is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life."

Section 2034(e) would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. Under current law, there is a one year period of special protection against discharge without cause after return from active duty and six months protection after return from initial active duty for training. There is no explicit protection for employees returning from active duty for training or inactive duty training regardless of length. Under this provision, the protection would begin upon proper and complete reinstatement. *See O'Mara* v. *Peterson Sand & Gravel Co.*, 498 F.2d 896, 898 (7th Cir. 1974).

The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or *pro forma* reinstatement. As expressed in *Carter* v. *United States*, 407 F. 2d 1238, 1244 (D.C. Cir. 1968), "cause" must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice expressed or fairly implied, that such conduct would be notice for discharge. The burden of proof to show that the discharge was for cause would be on the employer.

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43. *See Oakley* v. *Louisville and Nashville R. Co.*, 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 2024(a). It is to be understood, however, that good cause exists if the "escalator" principle would have eliminated a person's job or placed that person on layoff in the normal course.

Sections 2034(f) and (g) would make explicit the rights of reemployed servicemembers in their pension plans, such as no break in employment service would be considered to have occurred, no forfeiture of benefits already accrued would be allowed, and there would be no necessity to requalify for participation in the pension plan by reason of absence for military service.

Under the Supreme Court's decision in *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), service in the military is to be credited for both vesting and benefit accrual for pension purposes if the benefit is a reward for length of service and it is reasonably certain that the benefit would have accrued had the employee not been away in military service. The protections of these sections would apply equally to both defined benefit plans and defined contribution plans, so long as the specific plan at issue meets the requirement of Alabama Power that the benefit be a reward for length of service. *See Reilly* v. *New England Teamsters*, 737 F.2d 1274, 1281–82 (2d Cir. 1984). The same would be true of those profit-sharing plans which are in reality rewards for length of service. If the plan is contributory (*i.e.*, provides for employee contributions as well as employer contributions), the portion of such accrued benefit that is derivable from employee contributions would be required to be calculated only to the extent that the reemployed serviceperson makes the required employee contribution to the plan.

Section 2034(g)(1) is also intended to provide the pension plan with a claim against the employer for amounts that may be required to fund obligations arising under this section. In the case of a multiemployer plan, this provision would enable the plan to pursue its existing remedies under section 515 of the Employee Retirement Income Security Act, 29 U.S.C. 1145, for failure to make the required contributions, in the event that neither the plan nor the collective bargaining agreement pursuant to which the plan is maintained provides for any such funding obligations.

Section 2034(h) would allow an employee leaving for military service to use, at his or her choice, accrued vacation leave during the military absence if such vacation leave could have otherwise been used during this period. While current law prohibits an employer from forcing a reservist or National Guardsman to use paid vacation leave, which would still be the case, it does not explicitly allow such use if desired by the servicemember.

SUBCHAPTER III—PROCEDURES FOR ASSISTANCE AND ENFORCEMENT

Section 2041. Assistance in obtaining employment or reemployment; assistance in asserting claims with respect to State or local government or private employers

Section 2041 would reaffirm that the Secretary of Labor shall provide assistance in obtaining rights and benefits under chapter 43 for persons who claim that private employers or state or local governments have denied them such rights and benefits or are about to deny such rights and benefits. The Secretary's record of success since the reemployment rights assistance function was transferred from the Selective Service System in 1946 has been impressive, with over 95% of the cases received being satisfactorily resolved without resort to referral for litigation. Volunteer groups such as the National Committee for Employer Support of the Guard and Reserve (NCESGR) have also contributed to the success of amicable resolution of cases at an early stage, and these groups should be encouraged to continue their assistance with proper training.

Section 2042. Assistance in obtaining employment or reemployment by the Federal Government

Section 2042 would rewrite the protections afforded federal employees under chapter 43 and clarify that the reemployment obligation of federal agencies as employers is as strong as that of private employers and state and local governments. Proposed provisions would allow federal employees to apply to the Secretary of Labor for assistance in resolving reemployment rights claims, just like employees of private employers or state or local governments.

Under section 2042(a), it is established that the obligation to reemploy a federal employee is the same as that for a private sector or state or local government employee. However, subsection (c) provides that where, upon return from military service, the position or agency in the executive branch no longer exists or the agency that employed the person claims that it is not feasible to reemploy him or her, for a sufficient reason, the Director of the Office of Personnel Management (OPM) would be responsible for placing the servicemember in an equivalent position in the Executive Branch of the Federal Government. Current law requires the Director of OPM to "determine whether or not there is" such an equivalent position. Section 2042(c) would instead require the Director to "identify" such an equivalent position somewhere in the Executive Branch of the Federal Government. If OPM cannot locate a position which is fully equivalent in terms of seniority, status, and pay to the position that the servicemember occupied before his or her military service, then OPM would be required to identify the closest approximation consistent with the person's qualifications and the circumstances of his or her case.

Sections 2042(d) and (e) would apply to returning servicemembers who were employed by the legislative or judicial branch of the Federal Government, or as National Guard technicians prior to their military service. If those legislative or judicial branch employers or the Adjutant General of the State find it not feasible to reemploy such returning servicemembers, OPM would be required to identify for them positions in the executive branch, as discussed above.

Section 2043. Enforcement of employment or reemployment rights with the Federal Government

Under Section 2043, federal employees, including Postal Service employees, would have the right to have the Secretary of Labor investigate and attempt amicable settlement of claims under this chapter, a significant enhancement of enforcement rights for federal employees who claim deprivation of any rights under chapter 43. Absent such a settlement, and if the Secretary is reasonably satisfied that a violation has occurred, the claim would, upon request by the claimant, be required to be forwarded to the Office of Special Counsel (OSC) for litigation before the Merit Systems Protection Board (MSPB).

Section 2043 would give to the Merit Systems Protection Board (MSPB) the jurisdiction to decide contested cases about Federal sector reemployment rights, including cases brought by former Federal employees and employees of former employees of non-appropriated fund instrumentalities of the United States. MSPB determinations would be reviewable by the United States Court of Appeals for the Federal Circuit in the same manner that MSPB determinations generally are reviewable.

OSC would be required to represent a Federal sector claimant if the claimant requests OSC assistance and if the OSC is reasonably satisfied that the claimant is entitled to the benefits that he or she seeks. If the claimant does not wish to have OSC representation, or if the OSC is not reasonably satisfied that the claimant is entitled to the benefits that he or she seeks, the claimant could appeal to the MSPB on his or her own behalf or through private counsel retained at the individual's own expense.

The OSC would be required to provide representation before the MSPB but not on appeal from the MSPB to the Federal Circuit Court of Appeals or the Supreme Court. A person claiming reemployment rights with respect to the Federal Government as employer could appeal to the Federal Circuit Court of Appeals from an adverse MSPB determination. However, such a person would need to retain private counsel at his or her own expense at this level.

Section 2044. Enforcement of employment or reemployment rights with a State or private employer.

Section 2044 is similar to current section 2022, title 38, USC, with certain refinements and additions. The Secretary of Labor would retain the responsibility for investigating complaints filed by private sector and state and local government employees. In those cases where an amicable settlement cannot be reached, legal referral would be required to be made to the Attorney General by the Secretary upon request by the claimant.

The determination as to whether the Attorney General shall offer legal representation to a claimant under chapter 43 is to be made solely upon an assessment of the merits of the claimant's case. If the Attorney General determines that the Federal Government should provide legal representation, the Attorney General would be required to assign responsibility for providing such representation to the appropriate United States Attorney or to a Department of Justice attorney, or, as is suitable, to the Solicitor of Labor. In addition, other attorneys could be designated as necessary.

If the Attorney General declines to provide representation, or if for any reason the claimant does not desire to be represented by Federal Government counsel, the claimant could file suit through private counsel retained at his or her own expense or *pro se*. This is in accordance with the practice under the existing reemployment statute. Section 2044 would include a provision permitting a prevailing servicemember to be awarded attorney's fees and other litigation expenses if the case is pursued through private counsel.

Section 2044(d)(3) would make explicit that the Federal District Court may use its full equity powers, including issuance of temporary restraining orders, where appropriate.

Section 2044(d)(4) would provide that only persons claiming rights or benefits under chapter 43 may initiate an action, *i.e.*, no declaratory judgment actions by employers, prospective employers or other entities (such as pension plans or unions) can be filed.

Section 2044(d)(7) would reaffirm the 1974 amendment to chapter 43 that no State statute of limitation shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. *See Stevens* v. *Tennessee Valley Authority*, 712 F.2d 1047, 1056–1057 (6th Cir. 1983). Moreover, the Committee reaffirms, as was made clear in the 1974 legislative history, "that the time spent by the government agencies charged with the administration and enforcement of this Act in investigation, negotiation, and preparation for suit shall [not] be charged against the veteran in any consideration of a time-barred defense," *i.e.*, laches. Senate Report No. 93-907, 93rd Cong., 2d Sess. at 111–112 (June 10, 1974). *See Lemmon* v. *Santa Cruz County, Cal.*, 686 F. Supp. 797, 805 (N.D. Cal. 1988). Additionally, in dealing with the prejudice element of the laches defense, it was also made clear in Senate Report No. 93-907 at 113 "that the 'bumping of employees . . . [does not] constitute prejudice to the employer . . . " To the same effect, the payment of back wages or lost benefits, by itself, does not constitute prejudice in the laches context. *See Goodman* v. *McDonnell Douglas Corp.*, 606 F.2d 800, 808 (8th Cir. 1979); *Cornetta* v. *United States*, 851 F.2d 1372, 1380–82 (Fed. Cir. 1988).

Section 2044(d)(8) would make explicit that states are subject to the same remedies as imposed on private sector employers for violations of chapter 43. While the courts have had no difficulty in finding an abrogation of state sovereign immunity under both the Tenth and Eleventh Amendments by virtue of the explicit language in current section 2022 (*see Jennings* v. *Illinois Office of Ed.* 589 F.2d 935 (7th Cir. 1979); *Peel* v. *Florida Dept. of Transp.*, 600 F.2d 1070 (5th Cir. 1979)), the recent decision in *Reopell* v. *Comm. of Massachusetts* (D. Mass. Civil Action No. 87-0066-F, decided Sept. 7, 1990; appeal pending, 1st Cir., No. 90-1989) held that an express abrogation of the states' soverign immunity against an award of prejudgment interest was necessary in order to make such an award; the abrogation of just the underlying immunity to liability was not enough. Whether or not such an abrogation of the immunity exists in the current statute, as will be decided in Reopell, such an abrogation is now unquestionably being made in this amended Act.

In terms of the monetary remedies awarded under chapter 43, the principle that lost wages or other benefits lost because of violations of chapter 43 are to be calculated on a pay period-by-pay period basis is hereby affirmed. *See Dyer* v. *Hinky Dinky, Inc.*, 710 F.2d 1348, 1351–52 (8th Cir. 1983).

Finally, section 2044(e) would provide that a civil penalty of not more than $25,000 could be assessed for willful violations of chapter 43. The concept of "willful" should be the same as that used in the Age Discrimination in Employment Act, 29 U.S.C. 626(b), for the assessment of liquidated damages for willful violations of that Act. *See Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985). The Committee anticipates that the Secretary of Labor will prescribe regulations that should be taken into consideration in the assessment of any civil penalty imposed under this section.

SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

Section 2051. Conduct of investigation; subpoenas.

Section 2051 would provide for the conduct of investigations and provide the Department of Labor (DOL) with administrative subpoena authority. The reemployment rights statutes have not previously given DOL such authority, although the Department has had such authority under most statutes that it is charged with enforcing. This subpoena provision is typical of many such provisions in regulatory statutes. Some reemployment investigations have lasted an inordinate time, and the lack of subpoena authority has significantly contributed to such delays. The Committee expects that this new authority would enable the Department of Labor to enforce reemployment rights in a more timely and effective manner. This subpoena power shall be enforceable in Federal District Court.

SUBCHAPTER V—MISCELLANEOUS PROVISIONS

Section 2061. Regulations.

Section 2061 would give the Secretary of Labor the authority to promulgate regulations to carry out the policies of this Act. The Department of Labor has not previously had such authority, although several courts, including the Supreme Court, have given a "measure of weight" to the statutory interpretations expressed in the Department's Veterans' Reemployment Rights Handbook and Veterans' Reemployment Rights Legal Guide and Case and Supplements. *See, e.g., Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 563 n.14 (1981); *Leib* v. *Georgia & Pacific Corp.*, 925 F.2d 240, 245 (8th Cir. 1991); *Shadle* v. *Superwood Corp.*, 858 F.2d 437, 440 (8th Cir. 1988); *Dyer* v. *Hinky Dinky, Inc.*, 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith* v. *Industrial Employers and Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977); *Helton* v. *Mercury Freight Lines, Inc.*, 444 F.2d 365, 368 n.4 (5th Cir. 1971).

Section 2061(b)(1) would extend to the Director of OPM the authority to "issue regulations giving full force and effect to the provisions of this section" for the Executive Branch of the Federal Government. The current regulations may be found in Part 353 of Title 5 of the Code of Federal Regulations. Because the Federal Government is intended to be a model employer with respect to the policies of chapter 43, the OPM regulations under this Act must be consistent with the Department of Labor regulations dealing with State and local governments and private employers. Therefore, the Director of OPM must consult with the Secretary of Labor and the Secretary of Defense before promulgating such regulations.

Section 2061(b)(2) would authorize the Merit Systems Protection Board and the Office of Special Counsel to prescribe regulations to carry out their responsibilities under chapter 43.

Section 2062. Reports.

Section 2062 would require the Secretary of Labor, after consultation with the Attorney General and the Special Counsel, to provide an annual report to Congress concerning actions taken under chapter 43 during the prior fiscal year. The Committee wishes to ensure that such information is regularly and promptly provided. In order to fulfill its oversight responsibilities, the Committee must have access to recent statistics and information, and this annual report will enable the Committee to conduct effective oversight.

Section 2063. Severability provision.

Section 2063 would provide that if any provision of chapter 43 is declared invalid, the remainder of the chapter shall not be affected. This is a standard "severability clause."

Section 3. Conforming Amendments.

Section 3 of the reported bill would make conforming amendments to titles 38, 5, 10, and 28 of the United States Code.

Section 4. Effective Dates.

Sections 4(a)(1) and (2) of H.R. 1578, as amended, are transition provisions which would provide that the Committee bill shall only become effective with respect to reemployments initiated more than 60 days after enactment of this Act. The current law would remain in effect for 60 days after enactment of this Act.

Section 4(a)(3) of the reported bill would provide that, for purposes of the five-year service limitation provisions of the Committee bill, military service performed prior to the date of enactment of H.R. 1578, as amended, shall be considered toward the five-year limitation only to the extent that that period of military service would have counted toward the service limitations under current law. For example, if a National Guardsman served four years on active duty from 1980 - 1984, returned to his preservice employer in 1984 and then served three years from 1987 - 1990 in an Active Guard/Reserve (AGR) tour of full-time National Guard duty (defined as active duty for training for purposes of title 38, USC) under current law only the four years of active duty would count toward the service limitations of the amended Act. If the three years AGR tour began later than 60 days after the enactment of this Act, and was fully completed, this National Guardsman would not have reemployment rights after discharge from that AGR tour unless one of the exclusion provisions of section 2032(b) was applicable.

Section 4(b) of the reported bill would require that the new anti-retaliation provisions of section 2031(b)(1) of this Act, as opposed to those already in effect, are to become effective on the date of enactment of the Committee bill These new provisions include retaliation protection against persons who testify or assist in any proceeding, investigation or lawsuit under this Act and apply regardless of any period of military service.

Section 4(c) of H.R. 1578, as amended, which concerns the right of an employee to continue insurance coverage for up to 18 months while in the military service under section 2034(c), shall be effective on the date of enactment of this Act, except that a person who entered active military service between August 1, 1990 and the date of enactment of this Act and who is still in the military, may elect to reinstate or continue coverage for the remaining portion of the 18 months that began upon his or her leaving to enter military service. Thus, effective on or after the date of enactment of this Act, an employee in the military on the effective date of enactment of this Act, who entered the military after August 1, 1990, could choose to continue insurance coverage for whatever time remains of 18 months after leaving the employ of the employer to enter the military.

Section 4(d) of the reported bill would provide that the disability provisions of new section 2033(a)(3) shall apply to reemployments initiated on or after August 1, 1990 and are meant to supersede *ab initio* the provisions of section 2027 of current law effective that date.

OVERSIGHT FINDINGS

No oversight findings have been submitted to the Committee by the Committee on Government Operations.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee received the following letter from the Congressional Budget Office on the cost of H.R. 1578:

The Committee was advised by CBO that its estimate of H.R. 1578 would not be affected by the amendment adopted by the Committee.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 9, 1991.

Hon. G. V. Montgomery,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1578, the Uniformed Services Employment Rights Act of 1991, as introduced and referred to the Committee on Veterans' Affairs on March 21, 1991. We estimate that enactment of H.R. 1578 would not increase the federal budget and would not have any pay-as-you-go implications under section 252 of the Budget Enforcement Act of 1990. The bill would not affect the budgets of state and local governments.

H.R. 1578 would amend Chapter 43—Veterans' Reemployment Rights—of title 38, United States Code, to strengthen the reemployment rights of veterans. This bill would entitle any member of the uniformed services to reemployment and employment related rights and benefits as long as the cumulative period of military service does not exceed five years. A similar provision exists under current law but limits the period of military service to four years. This bill would increase the number of former workers rehired by the federal government and by state and local governments, but it is impossible to estimate the number of additional workers who would be rehired. Also, because the bill would not change federal or state and local government employment levels, it is not expected to increase governmental costs.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cory Oltman (226-2820).

Sincerely,

ROBERT W. REISCHAUER.

INFLATIONARY IMPACT STATEMENT

The reported bill will have no inflationary impact in fiscal year 1991.

DEPARTMENT VIEWS

The Committee received the following letters from Department of Labor concerning the reported bill:

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC. April 11, 1991.

Hon. G.V. (Sonny) Montgomery,
Chairman, Committee on Veterans' Affairs,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter requesting the Department of Labor's views regarding H.R. 1578, which would amend Title 38 of the United States Code with respect to employment and reemployment rights of veterans and other members of the uniformed services.

The bill would amend the veterans' reemployment rights (VRR) law (Sections 2021-2026 of title 38, United States Code) to provide a basic reorganization of the VRR law, and to assure that returning servicemembers are protected in all aspects of their employment (except for pay and work performed) as if they had been continuously employed during such period of service.

We are pleased that H.R. 1578 has few substantive differences from the Administration's Uniformed Services Employment Rights Act of 1991 (USERA), transmitted to Congress on March 5, 1991. We strongly support its enactment with certain modifications and have enclosed changes which would accomplish this result.

You further requested an estimate of the cost of H.R. 1578. We are pleased to report to you that both H.R. 1578 and the Administration's USERA would not result in any increase in costs for the government or the taxpayer. In fact, we believe that our efforts to strengthen and clarify the Veterans' Reemployment Rights statute will result in fewer VRR cases.

The Central Intelligence Agency has recently informed us that the proposed enforcement procedures in H.R. 1578 could unintentionally create significant national security problems for the Intelligence agencies. The Administration is working to resolve this problem and will apprise the Committee of changes to H.R. 1578 that may be needed.

The Office of Management and Budget advises that there is no objection to the transmittal of this letter from the standpoint of the Administration's program.

Sincerely,

LYNN MARTIN.

Enclosures.

Recommendations

Recommendation:

Add Sections 2022(a) and 2022(b) of the Administration's bill to Section 2022 of H.R. 1578.

Rationale:

Placing these two rules of construction in a comprehensive reemployment rights statute is important. Section 2022(a) commands the courts to construe the statute liberally for its intended beneficiaries, while Section 2022(b) invalidates purported waivers of reemployment rights not yet in being. This clearly prevents, for example, an employer from requiring a job applicant to waive future rights as a condition of employment.

Recommendation:

On page 7, line 5 in Section 2023(10) of H.R. 1578, add the word "Federal" between "competent" and "authority."

Rationale:

This change clarifies that only Federal or Federally-funded training and duty gives rise to rights for members of the National Guard, as under current law. As written, H.R. 1578 also would cover State service performed by National Guard members (*e.g.*, service in local emergencies, such as floods or riots). Many States have their own laws protecting the civilian jobs of National Guard members performing State service in the same States where they are employed.

Recommendation:

Add a new Section 2032(c) to H.R. 1578, at page 12 line 3 as follows:

> "In regulations to be promulgated under Section 2061 of this chapter, the Secretary may provide for additional categories of training or service to be excluded from the computation of the cumulative service limitation."

The subsequent subsections of Section 2032 should be renumbered accordingly.

Rationale:

It is important that the Secretary be given specific authority to designate additional exceptions to the cumulativeness rule in order to ensure that Reserve Component members not lose their jobs by inadvertently exceeding the five-year cumulative limit. This authority, which is in the Administration bill, would provide more flexibility to respond to changes in military programs or the previously cited sections of Title 10 and Title 32 and avoids the need to seek statutory amendments for changes in military personnel policies.

Recommendation:

Add to Section 2032(f)(2) of H.R. 1578, at page 14, line 9:

> "If the employer is not satisfied with the documentation that the applicant has provided, the employer may make further inquiries after reinstating the applicant. If as a result of such further inquiries by the employer it is established that the employee does not meet one or more of the eligibility criteria, such employee's employment and rights and benefits under this chapter may be terminated."

Rationale:

This language from the Administration's bill states more explicitly that the employer's duty is first to reinstate the employee and only thereafter to investigate in the event documentation is lacking. *Timely* reinstatement is an essential need of those returning, and the reemployment statute, while giving consideration to employer's interest, should give an employer little basis to delay or attempt to defeat the obligation to reinstate promptly.

Recommendation:

Amend Section 2033(a)(1) of H.R. 1578 (page 15) to read as follows:

> "(1) if such person's period of service was fewer than 181 days (), be employed promptly in the position which such person [] would have attained [] by remaining continuously employed by such employer, *unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified within a reasonable period of time.*"

Rationale:

Section 2033(a)(1) of H.R. 1578 appears to give the employer the option of reemploying the returning veteran or reservist in the preservice position, without seniority benefits, even if such person would have attained a better job if continuously employed. The Recommendation clarifies that the employer does not have the right to deprive the returning veteran or reservist of his or her proper place on the seniority escalator.

The provision concerning the returnee's qualifications for the position has been moved and rewritten to clarify that the ability to become qualified is not an eligibility criterion for the returnee but, rather that the returnee's inability to become qualified is an affirmative defense, for which the employer has the burden of proof. That the employer must be able to prove that the returnee is not qualified and cannot become qualified within a reasonable period of time conforms with existing case law. *See, e.g., Duey* v. *City of Eufaula, Alabama*, 102 LRRM 2898 (M.D. Ala. 1979); *McCoy* v. *Olin Mathieson Chemical Corp.*, 360 F. Supp. 1336 (S.D. Ill. 1973).

Recommendation:

Amend Section 2033(a)(2) of H.R. 1578 (pages 15 and 16) to read as follows:

> "(2) if such person's period of service was 181 days or more [], be employed promptly in the position which such person [] *would have attained if continuously employed by such employer or in another position which is equivalent in seniority, status, and pay to the position that such person would have attained if continuously employed, unless the employer can demonstrate that such person is not qualified for such position or any equivalent position and cannot become qualified within a reasonable period of time.*"

Rationale:

Section 2033(a)(2) applies to long tours of military duty (181 days or more). Section 2033(a)(2) has been rewritten to clarify that if the employer exercises the option to reemploy the returnee in an alternative position, the alternative position must be fully equivalent, in terms of seniority, status, and pay, to the position that the returnee would have attained if continuously employed.

Like the rewritten Section 2033(a)(1), the rewritten Section 2033(a)(2) clarifies that the employer is not permitted to deprive the returnee of the proper place on the seniority escalator and that the employer has the burden of proof on the affirmative defense that the returnee is not or cannot become qualified.

Recommendation:

To Section 2034(c)(1) of H.R. 1578, at page 19, line 6, substitute a comma for the period following the word "sentence" and add the following words: "except that in the case of persons ordered to training or service for fewer than 31 days, such a person may be required to pay only the employee share, if any, of the cost of such coverage."

Rationale:

The suggested amendment is necessary to ensure that there are no lapses in the health insurance coverage for the families of the personnel participating in training. Dependents of Reserve Component members ordered to short (30 days or fewer) periods of training or service are not entitled to use the military health care system, including the Civilian Health and Medical Program for the Uniformed Services. The suggested amendment would ensure that there are no such lapses.

Recommendation:

Add Section 4 of the Administration's bill, especially the proposed new Chapter 92 of Title 5, United States Code, to H.R. 1578, at page 32, line 15, as a new Section 4. Renumber Section 4 of H.R. 1578 as Section 5.

Rationale:

The proposed new chapter of Title 5 is necessary to ensure that Federal employees will have an effective remedy for breaches of their reemployment rights. This proposed new chapter clearly gives jurisdiction to the Merit Systems Protection Board (MSPB) to hear these reemployment cases involving the Postal Service and other Federal agencies as employers. Under current law, the MSPB's authority to enforce reemployment rights is somewhat uncertain. The proposed Section 9202(c)(2) of Title 5 also is needed to confer reemployment rights upon employees of Federal non-appropriated fund activities, such as military exchanges and clubs. Under current law, such employees have no forum in which to enforce their reemployment rights.

Of note is that Section 2043(a)(2)(B) of H.R. 1578 (page 24, line 20) refers to "Chapter 92 of Title 5." That chapter does not exist in current law, and it is not presently included in H.R. 1578.

Recommendation:

Add to Section 2034(f)(2) of H.R. 1578, at page 21, line 18:

> " . . . ; *and provide further that any such deemed service shall be taken into account in determining the person's right to accrue benefits under the plan only in the case of a defined benefit plan as defined in section 3(35) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1002(35) or under a similar Federal or State law governing pension benefits for governmental employees.*"

Rationale:

- The current language would ensure that reemployed veterans would be given credit for uniformed service for vesting purposes under their pension plans. We support this provision. The proposed insert would also give credit for accrual purposes under defined benefit plans. This would mean that time spent in uniformed service would count when the amount of the benefit was calculated under such a plan.
- This would codify the Supreme Court ruling under the current reemployment statute. *See Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977).
- The proposed insert would not apply to defined contribution plans. Benefits under such plans are generally determined without regard to each employee's length of service. For instance, contributions to such plans are often based on a percentage of pay and are made to each individual's account. An employer should not be required to contribute on behalf of a veteran who was not earning any pay while serving in uniformed service.
- In the absence of the proposed insert, the bill language would not require benefits accruals based on employer contributions under either a defined benefit plan or a defined contribution plan.
- Separate provisions of the bill would allow reemployed individuals to make "catch-up" contributions of their own money to a defined contribution plan, provided such contributions could have been made in the absence of uniformed service.

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC. March 5, 1991.

The Honorable Thomas S. Foley
Speaker of the House,
U.S. House of Representatives, Washington, DC.

DEAR MR. SPEAKER: I am pleased to enclose for the consideration of Congress a draft bill entitled "Uniformed Services Employment Rights Act of 1991" and a sectional analysis of the bill.

Since 1940, veterans, reservists and members of the National Guard have enjoyed varying degrees of protection that assured their return to civilian pre-service employment following military duty. For more than 50 years, this law, now codified at Chapter 43, Title 38, United States Code, has grown in size and complexity. It has not had substantial recodification since 1974. Since that time, over 600 court cases have further defined the limits of the law, often in a very confusing manner.

As the current situation in the Persian Gulf clearly demonstrates, our Nation's total force policy makes it more dependent than ever before on the Reserve Components for essential military readiness.

I believe the time has come to revise this statute with a view to preserving the historical protections while simplifying and reorganizing its contents to provide even better protection for those who elect to serve our country. Specifically, this proposed bill would replace the current law, reorganize its relevant provisions to make them meaningful in light of current case law and our country's reliance on the total force policy, while providing procedural safeguards for both claimants and employers.

We urge that this bill receive prompt and favorable consideration.

The Office of Management and Budget advises that there is no objection to the submission of this draft bill to the Congress and that its enactment would be consistent with the Administration's objectives.

Sincerely,

LYNN MARTIN.

Enclosures.

A BILL

To amend title 38, United States Code, to provide reemployment assistance to persons after service in the uniformed services, to encourage affiliation with and active participation in training programs of the reserve components, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Uniformed Services Employment Rights Act of 1991."

SECTION 2. AMENDMENT OF CHAPTER 43 OF TITLE 38.

Chapter 43 of title 38, United States Code, is amended to read as follows:

"CHAPTER 43—EMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

SUBCHAPTER I—PURPOSES, RULES OF CONSTRUCTION, AND DEFINITIONS

"§ 2021. Purposes

"The United States has a long tradition of non-career uniformed service performed by citizens for the common defense. In time of war or national emergency, such service augments the career Armed Forces; in time of peace, such service promotes military readiness and national security while minimizing the need for and cost of large standing military forces. Many individuals who are called to such non-career uniformed service, whether voluntarily or involuntarily, must interrupt civilian careers and pursuits to perform such service. While the interruption of civilian careers for service in the uniformed services is often an inconvenience to the individual, to employers, to fellow employees, and to the community, the lives and property of employers as well as everyone else in the United states are defended by such service. Therefore, the Congress declares that the purposes of this chapter are—

"(1) to encourage non-career service in the uniformed services of the United States by eliminating or minimizing those disadvantages to civilian careers and employment which would not occur but for such service; and

"(2) to minimize the disruption to the lives of individuals performing uniformed service, as well as minimizing the disruption to employers, to fellow employees, and to the community by providing for the prompt reemployment of persons completing honorable service in the uniformed services.

"§ 2022. Rules of Construction.

"(a) The provisions of this chapter are intended to be liberally construed in favor of persons with entitlements under this chapter and to be interpreted according to their plain or common meaning, except as specifically provided herein.

"(b) No agreement between any employer or group of employers and a labor organization, and no agreement among employers, may reduce or eliminate rights or benefits provided by this chapter. Any agreement or contract purporting to waive rights which have not yet matured under this Act shall be void as against public policy.

"(c) Nothing in this chapter shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance) or any plan provided by an employer which establishes rights or benefits which are greater than or in addition to those provided in this chapter, except that State laws and local ordinances may not impose additional obligations upon the Federal Government. This chapter shall supersede State laws and employer plans which purport to limit rights or benefits provided by this chapter or which purport to establish additional prerequisites to the exercise of such rights.

"(d) In civil actions brought in Federal courts to enforce this Act, the States shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer.

"(e) In determining a person's entitlement to rights and benefits under this chapter, the timing, frequency, and duration of any person's training or service or the nature of training or service in the uniformed services shall be presumed to be reasonable and protected so long as the service does not exceed the limitations set forth in section 2025(b) of this chapter, and training or service which the person volunteered for shall be entitled to the same protection as training or service imposed upon the person as a legal obligation.

"§ 2023. Definitions

"For the purposes of this chapter—

"(1) The term 'benefit' or 'benefit of employment' means any aspect of the employment relationship, other than wages or salary for work performed, provided by contract or employer practice or custom, that offers advantage, profit, privilege, gain, status, account, or interest and includes, but is not limited to, pension plans and payments, insurance coverage and awards, employee stock ownership plans, bonuses, severance pay, supplemental unemployment benefits, vacations, and selection of work hours or locations of employment.

"(2) The term 'completion of service in the uniformed services under honorable conditions' means the completion of a period of service in the uniformed services without—

"(A) receiving a dishonorable discharge, dismissal, or bad conduct discharge adjudged under chapter 47 of title 10;

"(B) being discharged under other than honorable conditions, under regulations prescribed by the Secretary of Defense or a Secretary concerned; or

"(C) being dismissed from or dropped from the rolls of an armed force under section 1161 of title 10.

"(3) The term 'employer' means any person, institution, organization, or entity paying salary or wages for work performed or having control over employment opportunities, and the term 'employer' shall include any person, institution, organization, or entity to whom the employer has delegated employment-related responsibilities. The term 'employer' shall include the United States, any State or political subdivision thereof, and any private employer (including successors in interest). Except as a common-law employer, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(2), shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 2027(f) of this chapter. In the case of a National Guard technician employed under section 709 of Title 32, the term 'employer' means the Adjutant General of the State in which the technician is employed.

"(4) The terms 'executive branch' and 'agency in the executive branch' mean any part of the executive branch of the Federal Government (including any executive agency as defined in section 105 of title 5), the United States Postal Service and the Postal Rate Commission, and any nonappropriated fund instrumentality of the United States.

"(5) The term 'notice' means (with respect to subchapter II of this chapter) any written or oral notification of an obligation to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

"(6) The term 'other than a temporary position' means a position of employment as to which there is a reasonable expectation that it will continue indefinitely.

"(7) The term 'Secretary', except where the context clearly indicates otherwise, shall refer to the Secretary of Labor or any offices/officials designated by the Secretary.

"(8) The term 'seniority' means longevity in employment together with any benefits of employment which accrue with or are determined by such longevity.

"(9) The term 'service in the uniformed services' means duty performed in a uniformed service under competent Federal authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, and the period of time an employee is absent from employment for the purpose of examination to determine fitness for service in the uniformed services.

"(10) The term 'State' includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

"(11) The term 'uniformed services' means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard, including the reserve components thereof as defined in section 101(27) of this title, the Army National Guard and Air National Guard when engaged in active duty for training as defined in section 101(22) of this title or in inactive duty training as defined in section 101(23) of this title, the commissioned corps of the National Oceanic and Atmospheric Administration, the commissioned corps of the Public Health Service, the Merchant Marine during time of war, national emergency, or when deemed necessary by the Secretary of Defense in the interest of national defense, and any other category of persons so designated by the President in time of war or national emergency.

"(12) The term 'United States' means any part of the Federal Government and includes the executive branch, the judicial branch, and the legislative branch.

"SUBCHAPTER II—RIGHTS, LIMITATIONS, PROHIBITIONS

"§ 2024. Discrimination against members of the uniformed services prohibited

"(a) A person who is a member of, was a member of, applies to become a member of, or has an obligation to a uniformed service shall not be discriminated against because of such present or past membership, application for membership, or obligation by being denied initial employment, reemployment, continuation of employment, promotion, or any benefit of employment.

"(b) A person shall be considered to have been denied employment, reemployment, continued employment, or any promotion or benefit of employment in violation of this chapter if the person's status or activity protected by this chapter was a substantial or motivating factor, although not necessarily the only factor, in the employer's decision to deny the person employment, reemployment, continued employment, or any promotion or benefit of employment, unless the employer can demonstrate that the same decision would have been made in the absence of the protected status or activity.

"(c) It shall be unlawful for an employer to discipline or discriminate against any person because such person has filed a complaint or sought assistance concerning an alleged violation of this Act, has testified in any proceeding under this Act, has assisted or otherwise participated in an investigation under this Act, or has exercised any right afforded by this Act. This subsection's protection against discrimination shall apply with respect to employment, reemployment, continued employment, promotions, and any benefit of employment. This subsection shall apply regardless of whether the person discriminated against has ever served in the uniformed services.

"§ 2025. Rights of persons absent from employment for service in the uniformed services; limits on right

(a) Except as otherwise provided in this chapter, anyperson who is absent from or leaves a position (other than a temporary position) in the employ of any employer, for voluntary or involuntary service in the uniformed services, is entitled to a leave of absence or is entitled, upon completion of service in the uniformed services under honorable conditions, to:

"(1) reemployment by such employer; and

"(2) employment related rights and benefits, as provided in this chapter.

"(b) Rights and benefits under this chapter shall be provided as long as such person's period of service in the uniformed services does not exceed five years, except that for purposes of this limitation no period of service shall include any service required:

"(1) to complete that portion of an initial obligated service requirement which exceeds five years;

"(2) to obtain orders releasing such person from a period of service in the uniformed services, if such person was unable to obtain such orders before the expiration of the period described in this subsection and such inability was through no fault of such person; or

"(3) to comply with a call to active duty during a period of war or national emergency.

"(c) The limitation upon service in the uniformed services, as described in subsection (b) of this section, shall be cumulative and shall include all periods of service in the uniformed services performed by a person after such person has begun the employment relationship with respect to which the person seeks reemployment. However, the regulations to be promulgated by the Secretary under Section 2033 of this chapter may provide for certain categories of training or service to be excluded from the computation of the cumulative limit.

"(d) Upon completion of service in the uniformed services under honorable conditions, a person returning from a leave of absence or entitled to reemployment under this section shall report to such person's employer—

"(1) at the beginning of the first regularly scheduled working period on the first calendar day following completion of such service and transportation back to the place of employment-

"(A) if such person's period of service was fewer than 31 days; or

"(B) if such person's service was for the purpose of examination to determine such person's fitness to enter service in the uniformed services, regardless of the length of such service;

"(2) not later than 14 days following completion of such service, if such person's period of service was 31 days or more but fewer than 181 days; or

"(3) not later than 90 days following completion of such service, if such person's period of service was 181 days or more.

"(e) The time limits specified in paragraph (d) of this section for a person to report for reemployment shall extend

"(A) by up to one year if the person who is required to report is hospitalized or is convalescing from an illness or injury; or

(B) by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within such time limits impossible or unreasonable.

"(f) A person who fails to report to the employer within the time limits specified in subsection (d) of this section shall not automatically forfeit such person's right to employment under subsection (a) of this section but shall be subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

"(g)(1) When applying for reemployment upon release from service in the uniformed services, such person shall, upon request, provide to his or her employer such documentation, if any, as is readily available to establish that his or her application is timely, that he or she has not exceeded the service limitations set forth in subsections (b) and (c) of this section, and that his or her service in the uniformed services was under honorable conditions. Documentation from any official source that these criteria have been met shall create a rebuttable presumption that the applicant is entitled to reemployment.

"(2) It shall be unlawful for an employer to delay or attempt to defeat the reemployment obligation by demanding documentation that does not exist or is not readily available. If the employer is not satisfied with the documentation that the applicant has provided, the employer may make further inquiries after reinstating the applicant. If as a result of such further inquiries by the employer it is established that the employee does not meet one or more of the eligibility criteria, such employee's employment and rights and benefits under this chapter may be terminated.

"(h) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of Title 5, United States Code, relating to veterans and other preference eligible persons

"(i) The entitlement of a person to reemployment under this section shall not be denied by an employer who is required to provide reemployment unless such employer's circumstances have so changed as to make such reemployment impossible or unreasonable.

"(j) Any employer who reemploys a person under this chapter and who is an employer contributing to any multiemployer plan (as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(37)), under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter shall, within thirty (30) days after the date of every such reemployment, provide notice of such reemployment to the administrator of every such plan.

"§ 2026. Position to which entitled upon reemployment

(a) Except as otherwise provided in this chapter, a person returning from service in the uniformed services as provided in section 2025 of this chapter shall—

"(1) if such person's period of service was fewer than 181 days and such person is still qualified to be employed in the position which such person left for service in the uniformed services, be employed in the same position, within time limits to be established by the Secretary in regulations to be promulgated pursuant to section 2033 of this chapter;

"(2) if such person's period of service was 181 days or more and such person is still qualified to be employed in the position which such person left for service in the uniformed service, be employed within time limits to be established by the Secretary in regulations to be promulgated pursuant to section 2033 of this chapter, in the same position or in a position of like seniority, status, and pay;

"(3) if disabled because of a disability incurred during a period of service in the uniformed services, and if, after reasonable efforts by the employer to accommodate the disability, such person is not qualified to be employed in the position which such person left for service in the uniformed services due to such disability, be employed in any other position of like seniority, status, and pay which such person is qualified to perform or in a position which is the nearest approximation thereof consistent with circumstances of such person's case; or

"(4) if such person is not qualified to be employed in the position which such person left for service in the uniformed services for any reason other than disability incurred during a period of service in the uniformed services and cannot become qualified within a reasonable period of time or through training which such person would have received had such person not been performing such service, be employed in any other position of lesser seniority, status, and pay which such person is qualified to perform.

"(b) If two or more persons are entitled to reemployment under section 2025 of this chapter in the same position and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to be reemployed in that position. Any person not reemployed in a position because of the application of the preceding sentence is entitled to be employed as otherwise provided in this chapter.

"§ 2027. Rights, benefits, and obligations of persons absent from employment for service in the uniformed service

"(a) (1) Except as provided in subsection (b) of this section, a person who is absent from employment for service in the uniformed services for a period of fewer than 31 days shall be considered, for all purposes (including seniority and benefits) except pay for work performed, to have been continuously in the employ of such employer during such period of service, and he or she shall continue to receive all benefits, other than salary or wages, as if he or she were continuously employed. Such person may be required to pay the employee cost, if any, of any funded benefit continued during such service.

"(2) A person who is ordered to perform service in the uniformed services for a period of 31 days or more shall, at such person's request, continue to be covered by insurance and similar short-term benefits provided by such employer for up to 18 months. Any person who elects coverage under this subsection may be required to pay the entire cost of any funded benefits continued pursuant to the preceding sentence.

"(b) A person who is reemployed under this chapter is entitled to the seniority and other benefits determined by seniority that he or she had at the time he or she left his or her job for service in the uniformed services plus any additional seniority and benefits, including insurance coverage, that he or she would have attained if he or she had remained continuously employed, and he or she is entitled to all rights and benefits that flow from such seniority.

"(c) A person leaving civilian employment for service in the uniformed services is also entitled to such other rights and benefits which—

"(1) have been established by contract, policy, or practice relating to employees on furlough or leave of absence; and

"(2) were applicable at the time such person entered service in the uniformed services, modified in accordance with the rules and practices of such employer governing the rights and benefits provided to employees on leave of absence.

"(d)(1) A person who leaves a civilian job for service in the uniformed services shall give notice to his or her civilian employer that service in the uniformed services will cause such person to be absent from scheduled civilian employment, unless giving notice is impossible or unreasonable, including but not limited to circumstances where providing notice is precluded by military necessity.

"(2) Whether military necessity precluded notification will be determined by the concerned uniformed service authority and shall not be subject to judicial review.

"(e) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

"(1) within one year, if such person's period of service was 181 days or more;

"(2) within six months, if such person's period of service was 31 days or more but fewer than 181 days; or

"(3) within three months, if such person's period of service was fewer than 31 days.

"(f) In the case of a benefit provided by an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(2), or a benefit provided under any Federal or State law governing pension benefits for governmental employees, the right to seniority benefits of a person reemployed under this chapter shall be determined under this subsection. A person reemployed under this chapter—

"(1) shall not be treated as having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services; and

"(2) shall have his or her period or periods of service in the uniformed services deemed to constitute service with the employer or employers maintaining the plan for purposes of determining the nonforfeitability of his or her accrued benefits, provided: That such person meets the eligibility criteria under this chapter and the regulations promulgated under Section 2033 of this chapter; and, provided further that: Any such deemed service shall be taken into account in determining his or her right to accrue benefits under the plan only in the case of a defined benefit plan as defined in section 3(35) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(35) or under a similar Federal or State law governing pension benefits for governmental employees.

"(g)(1) An employer reemploying a person under this chapter shall be liable to an employee benefit pension plan for funding any obligation of the plan to provide the benefits described in subsection (f) of this section. For purposes of determining the amount of such liability, and for purposes of section 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1145, or for purposes of any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed to be service with the employer pursuant to such subsection shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement.

"(2) A person returning to civilian employment under this chapter shall be entitled to accrued benefits pursuant to subsection (f) of this section that are derived from employee contributions only to the extent the person makes payment to the plan in respect of such contributions (not to exceed the amount the person would have been permitted or required to contribute had he or she remained continuously employed by the employer throughout the period of deemed service described in subsection (f))."

"SUBCHAPTER III—PROCEDURES FOR ASSISTANCE AND ENFORCEMENT

"§ 2028. Assistance in obtaining employment; legal assistance in asserting claims with respect to State or local governments or private employers

"(a) The Secretary of Labor (through the Veterans' Employment and Training Service) shall provide assistance in obtaining employment or reemployment to any person entitled to rights and benefits under this chapter. The Secretary may use existing Federal and State agencies engaged in similar or related activities and the assistance of volunteers.

"(b) Any person who claims that such person has been denied or is about to be denied any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

"(c) If the Secretary, after investigation, finds probable cause to believe that a violation has occurred, and if efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation, the Secretary shall refer the case to the Attorney General. If the Attorney General is reasonably satisfied that the person requesting representation is entitled to the benefits sought, the Attorney General shall appear and act as attorney for the claimant in the filing of a complaint and other appropriate motions and pleadings and the prosecution thereof. The appearance may be made by the Attorney General personally or by such other attorneys designated by the Attorney General.

"§ 2029. Assistance in obtaining reemployment by the United States

"(a) Except as provided in subsections (d) and (e) of this section, if a person is entitled to be reemployed under section 2025 of this chapter by the United States, such person shall be reemployed in a position described in sections 2026 and 2027 of this chapter.

"(b) Any person who claims that the Federal Government, as employer, has denied or is about to deny such person any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

"(c) If the Secretary, after investigation, finds probable cause to believe that a violation has occurred, and if the efforts to obtain voluntary compliance are not successful, and if the claimant requests legal representation in pursuing the claim before the Merit Systems Protection Board, the Secretary shall refer the case to the Office of Special Counsel. If the Office of Special Counsel is reasonably satisfied that the person requesting representation is entitled to the benefits sought, the office of Special Counsel shall appear and act as attorney for the claimant in filing an appeal to the Merit Systems Protection Board and in pursuing that appeal. The Office of Special Counsel shall represent such claimant before the Merit Systems Protection Board but not before the Federal Circuit Court of Appeals or the Supreme Court on appeal from the Merit Systems Protection Board.

"(d) If the employer of a person described in subsection (a) of this section was, at the time such person entered service in the uniformed services, an agency in the executive branch and the Director of the office of Personnel Management determines that—

"(1) such employer no longer exists and its functions have not been transferred to another part of the executive branch; or

"(2) it is not feasible for such employer to reemploy such person,

the Director shall further identify an alternative position of like seniority, status, and pay for which such person is qualified in another part of the executive branch, and the Director shall cause employment in such position to be offered to such person.

"(e) If the employer of a person described in subsection (a) of this section was, at the time such person entered service in the uniformed services, a part of the judicial branch or the legislative branch of the United States and such employer determines that—

"(1) it is not feasible for such employer to reemploy such person; and

"(2) such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of Title 5, United States Code, such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch on the same basis as described in subsection (d) of this section.

"(f) If the adjutant general of a State determines that it is not feasible to reemploy a person who was a National Guard technician employed under section 709 of title 32, and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(d) of title 5, United States Code, such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch of the Federal Government of the United States on the same basis as described in subsection (d) of this section.

"§ 2030. Enforcement of reemployment rights with the United States

"Any person who claims that—

"(1) such person is entitled under this chapter to reemployment or other rights or benefits under this chapter with respect to employment by the United States; and

"(2) (A) such employer has failed or refused to comply with the provisions of this chapter; or

(B) the Office of Personnel Management has failed or refused to comply with the provisions of this chapter;

may submit an appeal to the Merit Systems Protection Board under the provisions of Chapter 92 of Title 5, United States Code.

"§ 2031. Enforcement of reemployment rights with a State or private employer

(a) A person who claims that—

such person is entitled under this chapter to employment or reemployment by a State or political subdivision thereof or a private employer; and

"(2) such employer or potential employer has failed or refused to comply with the provisions of this chapter; may file a complaint with the Secretary of Labor. Such complaint shall be investigated under the provisions of Subchapter IV of this chapter.

"(b) Such complaint shall be in writing, shall be in such form as the Secretary may prescribe, shall include the name and address of the employer against whom the complaint is filed, and shall contain a summary of the allegations that form the basis for the complaint. Prior to the receipt of a written complaint, the Secretary may provide advice or technical assistance to the potential claimant.

"(c)(1) If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of this chapter, the District Court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions.

"(2) No fees or court costs shall be charged or taxed against any person claiming rights under this chapter.

"(3) In any such action only the employer shall be deemed a necessary party respondent.

"(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

"(5) No State statute of limitations shall apply to any proceedings under this chapter.

"SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

"§ 2032. Conduct of investigation; subpoenas

In carrying out investigations under this Act, the Secretary's duly authorized representatives shall at all reasonable times have access to, for the purpose of examination, and the right to copy and receive, any documents of any person or employer. In carrying out investigations under this Act, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General of the United States may apply to any District Court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the Secretary's subpoena. Upon the application of the Attorney General of the United States, the District Courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful inquiry under this Act. The District Courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.

"SUBCHAPTER V—MISCELLANEOUS PROVISIONS"

"§ 2033. Regulations

"(a) The Secretary of Labor (in consultation with the Secretary of Defense) shall prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States and private employers.

"(b) The Director of the office of Personnel Management (in consultation with the Secretary of Labor and the Secretary of Defense) shall prescribe regulations implementing the provisions of this chapter with regard to reemployment by the United States. Such regulations shall be consistent with the regulations pertaining to the States and private employers. It is the intention of Congress that the Federal Government should be a model employer with respect to the policies of this chapter.

"§ 2034. Severability Provision

If any provision of this chapter, or the application of such provision to any person or circumstance, were to be held invalid, the remainder of this chapter or the application of such provision to other persons or circumstances shall not be affected thereby.

"§ 2035. Transition Provisions

"(a) The requirement to give notice to one's employer prior to service in the uniformed services, as contained in section 2027(d) of this Act, shall not apply to persons serving in active service in the uniformed services on the date of enactment of this Act, with respect to that service, nor shall it apply to any service performed before the date of enactment of this Act.

"(b) The provisions of sections 2025(j) and 2027(g) concerning pensions shall be effective on the date of enactment of this Act.

"(c)(1) The provisions of section 2027(a) concerning insurance coverage and other short-term benefits shall be effective on the date of enactment of this Act, except as provided in section 2035(c)(2).

"(2) A person who entered active service in the uniformed services after August 1, 1990, and prior to the date of enactment of this Act, or a family member or personal representative of such person, may, after the enactment of this Act, elect to reinstate or continue insurance coverage and other short-term benefits as provided in section 2027(a)(2) of this chapter. If such an election is made, insurance coverage and other short-term benefits may remain in effect for the remaining portion of the 18-month period that began on the date of such person's separation from civilian employment.

"(d) Except as otherwise provided in this Act, the provisions of this Act and the amendments made by this Act do not affect rights, benefits, and duties that matured, penalties that were incurred, and proceedings that were begun before the effective date of the pertinent section or subsection of this Act."

SECTION 3. AMENDMENTS TO TITLE 38, UNITED STATES CODE.

Title 38, United States Code, is amended—

(1) in section 2001 (5)—

(A) by striking out "or" at the end of clause (B);

(B) by striking out the period at the end of clause (C) and inserting in lieu thereof, "or";

(C) by adding at the end thereof the following new clause:

"(D) a member of a reserve component."; and

(2) in section 3103A (b) (3)

(A) by striking out "or" at the end of clause (E);

(B) by striking out the period at the end of clause (F) and inserting in lieu thereof; "or";

(C) by adding at the end thereof the following new clause:

"(G) to reemployment benefits under chapter 43 of this title."

SECTION 4. AMENDMENTS TO TITLE 5, UNITED STATES CODE.

Title 5, United States Code, is amended—

(1) in section 1204(a)(1) by striking out "section 2023" and inserting in lieu thereof "chapter 43 oftitle 38";

(2) in chapter 35

(A) by repealing section 3551; and

(B) by striking out the item relating to section 3551 and to subchapter II in the table of sections at the beginning of such chapter; and

(3) by enacting a new Chapter, Chapter 92, as follows:

"§ 9201 Reemployment rights of veterans, reservists and members of the National Guard

The Federal Government, as an employer, shall observe the requirements of Chapter 43 of Title 38 under the same conditions and to the same extent that said chapter requires of other employers. It is the intent of Congress that the Federal Government should be a model employer with respect to the purposes and policies of Chapter 43 of Title 38."

"§ 9202 Appellate procedures

(a) An employee or an applicant for employment or reemployment may submit an appeal to the Merit Systems Protection Board if such employee or applicant believes that any Federal agency has failed or refused to comply with its obligations under Chapter 43 of Title 38, or that the Director of the Office of Personnel Management has not met the obligations set forth in sections 2029(d) or 2029(e) of Title 38."

"(b) If the Merit Systems Protection Board concludes that a Federal agency, as employer, has failed or refused to comply with the provisions of Chapter 43, Title 38, or that the Director of the Office of Personnel Management has not met the obligations set forth in section 2029(d) or section 2029(e) of Title 38, the Board shall enter an order specifically requiring the employing agency or the Director to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of the employing agency's or the Director's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in Chapter 43 of Title 38. For purposes of the enforcement of this chapter and Chapter 43 of Title 38, the Merit Systems Protection Board shall have the same authority, with respect to Federal agencies as employers, or to the Director of the office of Personnel Management, as a United States District Court has with respect to State or local governments or private employers, under section 2031(c) of Title 38."

(c) For purposes of this chapter and Chapter 43 of Title 38, but not necessarily for purposes of any other law, the following organizations and entities shall be considered to be 'Federal agencies':

(1) Any department, administration, agency, commission, board, or independent establishment in the Executive Branch of the Federal Government, including the United States Postal Service and the Postal Rate Commission;

"(2) Any non-appropriated fund activity of the United States, and

"(3) Any corporation wholly owned by the United States.

"Employees of any of the above entities and former employees who left employment for purposes of service in the uniformed services or for examination to determine fitness for such service shall have the rights and benefits provided by this chapter and Chapter 43 of Title 38, and shall have the right to appeal to the Merit Systems Protection Board if they believe that such rights have not been properly accorded to them. An employee or former employee of the Legislative Branch or the Judicial Branch of the Federal Government who believes that the Director of the Office of Personnel Management has not met the obligations set forth in section 2029(e) of Title 38 shall have the right to appeal to the Merit Systems Protection Board to obtain an order directing the Director to comply with such obligations and to compensate the appellant for any pay or benefits lost by reason of the delay in meeting those obligations."

"(d) An appeal under this chapter may be brought within 25 days after receipt of notice of the personnel action upon which an appeal is based, if the person as to whom such action has been taken has been notified in writing of the action and specifically informed of the 25-day deadline. An appellant shall be deemed to have complied with the 25-day deadline if within that period a written request for assistance is submitted to the Secretary of Labor, in accordance with Section 2029 of Title 38."

"(e) If the claimant has applied to the Secretary for assistance under Section 2029 of Title 38, an appeal of an agency action to the Merit Systems Protection Board under Section 9202 must be filed during the period beginning on the day after the claimant has received the Secretary's determination as to the outcome of the investigation and ending 25 days after the day of receipt of that notice."

"§ 9203 Judicial review

"An appellant under this chapter may petition the United States Court of Appeals for the Federal Circuit to review a decision of the Merit Systems

Protection Board denying such appellant the relief sought, in whole or in part, subject to the conditions and in accordance with the procedures set forth in section 7703 of this Title."

"§ 9204 Representation of appellants under this chapter

(a) A person claiming rights or benefits under this chapter and Chapter 43 of Title 38 may apply to the Secretary of Labor for assistance in asserting his or her rights, in accordance with section 2029(b) of Title 38. If the Secretary concludes that such person's claim has a reasonable basis, and if efforts to resolve the claim informally are not successful, the Office of Special Counsel, if reasonably satisfied that the person requesting representation is entitled to the benefits sought, shall appear and act as attorney for such person in presenting an appeal to the Merit Systems Protection Board. If such person chooses not to apply for assistance or representation, or if the office of Special Counsel is not reasonably satisfied that the person is entitled to the benefits sought, such person may be represented by counsel retained at his or her own expense."

"(b) The Office of Special Counsel shall not represent appellants with respect to review of decisions of the Merit Systems Protection Board in the United States Court of Appeals for the Federal Circuit or the Supreme Court. A person seeking such judicial review, or a person who has prevailed in the Merit Systems Protection Board but the Board's decision has been appealed by another party, may be represented by counsel retained at his or her own expense."

SECTION 5. AMENDMENTS TO TITLE 10, UNITED STATES CODE.

Section 706 (c) (1) of title 10, United States Code, isamended by striking out "section 2021" and inserting in lieuthereof "chapter 43".

SECTION 6. AMENDMENTS TO TITLE 28, UNITED STATES CODE.

Section 631 of title 28, United States Code, is amended—

(1) by repealing subsection (j); and
(2) by redesignating subsection (k) as subsection (j).

SECTION 7. EFFECTIVE DATE

This Act shall be effective as of August 1, 1990, except as provided in section 2035 of title 38, as enacted by this Act.

UNIFORMED SERVICES EMPLOYMENT

RIGHTS ACT OF 1991

SECTIONAL ANALYSIS

SECTION 1: TITLE

Section 1 of the bill provides that the Act may be cited as the "Uniformed Services Employment Rights Act of 1991."

SECTION 2: CHAPTER 43 OF TITLE 38

Section 2 of the bill repeals Chapter 43 of Title 38, United States Code, and enacts an entirely new chapter consisting of five subchapters.

SUBCHAPTER I—PURPOSES, RULES OF CONSTRUCTION, AND DEFINITIONS

Section 2021

Source: New

This section states the purposes for which this Act is being enacted and is intended to be helpful to courts construing the statute. Although the reemployment rights statute has not previously contained an express statement of purposes, the purposes contained in this statement are not new and could have been included in any of the previous versions of the law, going back to 1940.

Section 2022

Source: New

Section 2022(a) is intended to codify the statement of the Supreme Court that the reemployment rights statute should be "liberally construed for the benefit of those who left private life to serve their country." *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946). If there are two or more reasonable interpretations of any provision of this Act, the court should choose that interpretation which is most beneficial to the Act's intended beneficiaries.

Section 2022(b) codifies the Supreme Court's statement that, "[N] practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." Fishgold, 328 U.S. at 285.

The second sentence of Section 2022(b) deals with the issue of the waiver of rights and benefits under this statute. Rights under the Act belong to the claimant, and he or she may waive those rights, either explicitly or impliedly through conduct. Because of the remedial purposes of the Act, any waiver must be clear, convincing, specific, and unequivocal. Moreover, only known rights which are already in being may be waived. An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, is contrary to the public policy embodied in the Act and is void.

Section 2022(c) carries over the non-preemption provision contained in the final sentence of 38 U.S.C. § 2021(a), but the scope of the provision has been broadened somewhat. The Act is intended to be a floor and not a ceiling on reemployment rights.

Section 2022(c) also clarifies that State laws and local ordinances may not impose additional obligations upon the Federal Government as an employer. Permitting the States to regulate the conditions of Federal employment would be inconsistent with the concept of Federal supremacy under our nation's federal system of government.

The final sentence of Section 2022(c) makes it clear that this chapter *does* preempt State laws which purport to limit rights or benefits under this chapter or which purport to impose additional prerequisites upon the exercise of those rights or the enjoyment of those benefits. This is in accordance with judicial interpretations of the current reemployment statute. *See, e.g., Peel* v. *Florida Department of Transportation*, 600 F.2d 1070, 1073–74 (5th Cir. 1979); *Cronin* v. *Police Department of the City of New York*, 675 F. Supp. 847, 853 (S.D.N.Y. 1987).

In a recent case, the United States District Court for the District of Massachusetts refused to award prejudgment interest on a State policeman's back pay award. *Respell* v. *Commonwealth of Massachusetts*, Civil Action No. 87–0066–F (D. Mass. Sept. 7, 1990), *appeal docketed*, No. 90–1989 (1st Cir. Oct. 4, 1990). The court held that the Eleventh Amendment precludes the award of prejudgment interest against States, in the absence of an express Congressional abrogation of Eleventh Amendment immunity with respect to interest. *Id.* While it is not conceded that prejudgment interest may not be awarded against States under the existing reemployment statute, the purpose of Section 2022(d) is to abrogate the Eleventh Amendment immunity of States with the degree of specificity required by the District of Massachusetts in order to prevent this issue from arising under the Act. Prejudgment interest is considered to be an essential element of the "make-whole" remedy available to claimants under the Act and the existing reemployment statute. *See Hanna* v. *American Motors Corp.*, 724 F.2d 1300, 1310–12 (7th Cir. 1984), *cert. denied*, 467 U.S. 1241 (1984).

Section 2022(e) is intended to apply primarily to periods of training duty performed by members of the National Guard or Reserve. Many members are required to participate only in one weekend of inactive duty training per month and two weeks of active duty for training per year, but some members are asked to participate in much more extensive training. Experience in Operation Desert Shield/Storm demonstrates the need to ensure that Reserve Component members are fully trained and prepared to carry out their missions, because there may not be time to train them further after an emergency arises. For all individuals developing special expertise, and in particular for combat units and units whose missions require advanced training, it sometimes is necessary for Reserve Component personnel to participate in training which is far more extensive than the one-weekend-permonth, two-weeks-per-year minimum requirement.

Section 2022(e) is intended to give Reserve Component members the opportunity to participate in such necessary military training. The services are urged to establish controls which will ensure that Reserve Component members do not receive orders for unnecessary training. Although the individual member normally initiates the process for the issuance of orders by submitting an application, military authorities are not required to issue orders simply because a member has requested them. The intent of Section 2022(e) is that the decisions as to how much training is necessary and which members are selected for training are to be made by military authorities, not by civilian employers or the courts.

It is recognized that granting leaves of absence for protracted and/or frequently recurring military training periods presents problems for some employers, especially small employers. It is also recognized that some Reserve Component members abuse the system by arranging for repeated, lengthy military training periods that may not be militarily necessary. The services should address these situations by establishing more effective controls upon the issuance of training orders.

If an employee requests military leave for a period of time which is particularly inconvenient for the civilian employer, or if repeated, lengthy military-related absences become cumulatively burdensome, it is permissible for an employer to contact the commanding officer of a member's reserve unit or reserve center to request that the training be rescheduled or canceled. Commanding officers are and should be willing to work with employers to mitigate or avoid problems of this kind, to the extent that it is possible to do so without detracting from military readiness. Commanding officers, if able, also should distribute orders for lengthy training among many unit members in order to minimize the burden upon any one employer. The Department of Defense, through its National Committee for Employer Support of the Guard and Reserve, should educate employers as to the proper channels for requesting the rescheduling or rescission of military training orders.

In any event, Section 2022(e)'s reasonableness presumption is rebuttable, but the sole focus of the reasonableness inquiry should be on the conduct of the employee, not the decisions of the military concerning training or other duty. The length of the training, the burden to the employer, or the fact that the employee volunteered for training are not enough, by themselves, to make military leaves unreasonable. This is consistent with the government's construction of existing law as articulated in a pending Supreme Court case, *King* v. *St. Vincent's Hospital*, No. 90-899. For example, if the employer established that the employee had arranged repeated, lengthy military training assignments with the *specific intent* of harming the employer, the presumption of reasonableness might be deemed to have been overcome. The employer has a heavy burden of proof on this question, in order to ensure that employees are not deprived of the opportunity to engage in necessary military training.

Section 2023

Source: New

This section defines terms which have been used in previous reemployment statutes without being defined, as well as terms that are new.

Section 2021(b)(3) of the current reemployment statute provides, inter alia, that a reservist or National Guard member shall not be deprived of an "incident or advantage of employment" because of his or her military obligations, but the current statute does not define that phrase. The Act substitutes the word "benefit" for the phrase "incident or advantage of employment", and Section 2023, paragraph (1) defines the word "benefit" broadly to include all attributes of the employment relationship provided by contract or employer custom and practice, other than wages for work performed.

Section 2023, paragraph (2) defines the phrase "completion of service in the uniformed services under honorable conditions" by listing those events which would *not* constitute "honorable conditions." Under all other circumstances, the person completing service would be deemed to meet this criterion. "Honorable" discharges would meet this requirement, as would discharges labeled "general, under honorable conditions." "Uncharacterized" discharges and "entry-level separations" would also give rise to reemployment rights.

The characterization of service applied by the uniformed service (usually on the Department of Defense Form 214) shall be binding on both the veteran and the employer. An upgrade of an "other than honorable" discharge shall give rise to reemployment rights only if the upgrade is retroactive and only if the veteran otherwise meets the eligibility criteria, including having made a timely application for reemployment after the original discharge. *See* the discussion of Section 2025(g), *infra*, with regard to the way to establish that an applicant for reemployment has completed service under honorable conditions.

Section 2023, paragraph (3) broadly defines the term "employer." The Act should apply to a situation wherein an employee works for several employers and is referred by a union hiring hall or other employment agency (*e.g.*, construction industry, longshoring, etc.). *See, e.g., Imel* v. *Laborers Pension Trust Fund of Northern California*, 904 F.2d 1327 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 343 (1990); *Akers* v. *Arnett*, 597 F. Supp. 557 (S.D. Tex. 1983), *aff'd*, 748 F.2d 283 (5th Cir. 1984).

Section 2023, paragraph (3) makes it clear that the obligations of the employer also apply to the employer's "successor in interest." The term "successor" is to be broadly construed. The courts should use a flexible approach and should enforce reemployment obligations upon "successor" employers when it is equitable to do so, giving due deference to Section 2022's commandment to construe the Act liberally. The courts may consider the following factors, among others:

a. The ability of the predecessor employer to provide meaningful relief.
b. Whether there has been a substantial continuity of business operations.
c. Whether the new employer uses the same facilities.
d. Whether that employer uses the same or substantially the same workforce.
e. Whether that employer uses the same or substantially the same supervisory personnel.
f. Whether that employer uses the same machinery, equipment, and method of production.
g. Whether that employer produces the same product or service.
h. Whether the same jobs exist under substantially the same working conditions.

The factors set forth above are intended only to be illustrative of the kinds of factors that a court may consider in determining whether it is equitable to place "successorship" obligations upon the new employer. It is not necessary to establish that each of these factors is present.

The new employer's awareness of the potential for a reemployment rights claim, at the time of the merger or acquisition, should not be a factor in this analysis. In practice, it is unlikely that a new employer would often be aware that some former employees of the old employer were serving in the uniformed services at the time of the takeover.

Section 2023, paragraph (3) broadly defines "employer" to include any entity to whom the common-law employer has delegated employment-related responsibilities. A pension plan would be an example of such an entity, but Section 2023, paragraph (3) contains a limitation on the obligations of a pension plan, as an entity separate from an employer maintaining the plan, under this chapter. Unless the reemployed person is an employee of the plan, in the traditional or common law sense, a pension plan is treated as having an obligation only with respect to the provision of pension benefits set forth in Section 2027(f).

The final sentence of Section 2023, paragraph (3) provides that the employer of a National Guard technician shall be the Adjutant General of the State where the technician is employed. Because of the hybrid State-Federal status of National Guard technicians, these persons have had difficulty enforcing their rights under the existing reemployment statute. The purpose of this sentence is to clarify that National Guard technicians shall be considered to be State employees for purposes of this Act, but not necessarily for any other purpose.

Section 2023, paragraphs (4) and (12), defines "United States", "executive branch", and "agency in the executive branch" and thereby determines the administrative and adjudicative jurisdiction of the Office of Personnel Management and the Merit Systems Protection Board. (*See* the discussion of Sections 2029 and 2030, *infra.*) The definition of "agency in the executive branch" intentionally includes the United States Postal Service and also non-appropriated fund instrumentalities of the United States (*e.g.*, military exchanges and officers' clubs). The intent is to give those employees the same reemployment rights as other Federal employees. *See also* the discussion of Section 4 of this Act, *infra*, which enacts a new Chapter 92 of Title 5, United States Code.

Section 2023, paragraph (5) stresses that any written or oral notification to an employer of an obligation to perform service in the uniformed service shall constitute proper "notice" where notice to the employer is required by this Act. While it would probably be advisable for a reservist or National Guard member to give his or her employer written notice of his or her military drills and active duty for training, in order to avoid problems of proof, an oral notice, if it can be established factually, should be deemed legally sufficient.

Section 2023, paragraph (5) also permits the uniformed service in which the service is to be performed to provide notice to the employer. This is a new provision.

Section 2023, paragraph (6) defines "other than a temporary position" in such a way as to make the Act apply to most employment to which veterans might wish to return. The intent is to approve the definition used by the United States Court of Appeals for the Sixth Circuit. *See Stevens* v. *Tennessee Valley Authority*, 687 F.2d 158, 161-62 (6th Cir. 1982).

Section 2023, paragraph (7) defines "Secretary" as the Secretary of Labor or any offices or officials designated by the Secretary of Labor.

Section 2023, paragraph (8) defines "seniority" as longevity in employment together with any benefits of employment which accrue with or are determined by such longevity.

Section 2023, paragraph (9) defines "service in the uniformed services" to include all kinds of training or service, including active duty, active duty for training, initial active duty for training, inactive duty training, etc. In the past, entitlements and eligibility criteria for reemployment rights have differed based upon categories of military training or duty. It has been concluded that those distinctions are unnecessary and only lead to confusion and anomalous results in some cases. As is explained more fully in subchapter II, *infra*, rights and responsibilities under this Act will depend upon the duration of uniformed service rather than the category.

Section 2023, paragraph (10) defines "State" as any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States, together with the political subdivisions of each of these.

Section 2023, paragraph (11) defines the term "uniformed services" to include all seven such services and their reserve components. The commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration are hereby added to the categories of beneficiaries of the reemployment rights statute.

Although the Merchant Marine is not a traditional uniformed service, Section 2023, paragraph (11) provides that members of the Merchant Marine shall be accorded rights and benefits under this Act, as though the Merchant Marine were a uniformed service, when deemed necessary by the Secretary of Defense. Treating the Merchant Marine as though it were a uniformed service for purposes of this Act shall not affect rights of Merchant Marine members for any other purpose.

During Operation Desert Shield, it was necessary to utilize cargo vessels to transport military equipment to the theater of operations, and it was necessary to recruit personnel to operate those vessels. Many of those personnel left jobs in other industries in order to support Operation Desert Shield. It is anticipated that reemployment rights will be provided for persons who leave other jobs to operate vessels in support of an American military operation like Operation Desert Shield.

Section 2023, paragraph (11) also gives the President the authority to designate any other category of persons a "uniformed service" during time of war or national emergency. During World War II, particularly, certain categories of persons (*e.g.*, Women's Air Service Pilots), who were considered civilians at the time, performed important, arduous, and sometimes dangerous service that should be recognized in law.

Section 2023, paragraph (12) has been discussed in connection with Section 2023, paragraph (4), *supra*.

SUBCHAPTER II—RIGHTS, LIMITATIONS, AND PROHIBITIONS

Section 2024

Source: 38 U.S.C. § 2021(b)(3), greatly revised.

The current reemployment statute protects Reserve and National Guard personnel from discharge or discrimination based upon their military obligations. *See* 38 U.S.C. § 2021(b)(3). Section 2024(a) is intended to reenact that provision and also to extend the protection of the reemployment statute to present members of the uniformed services, former members, applicants for membership, and persons who are subject to induction.

The Department of Labor has encountered some cases involving the following scenario: An employee enlists in a Delayed Entry Program of a uniformed service on June 1 and receives orders to report for basic training on September 1. The employee informs his or her civilian employer on June 2, saying that he or she wishes to continue working until August 29. The employer thereupon discharges the employee. While such employer conduct has been held to be prohibited by the current reemployment statute, Section 2024(a) makes such employer conduct explicitly unlawful.

In the hypothetical situation mentioned above, the employee should be able to recover the three months of back pay whether or not he or she has any intention of seeking reemployment after his or her release from active duty. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not await the completion of the service.

Section 2024(b) is intended to establish the burden of proof for cases under Section 2024(a). A discharge or adverse action would be considered to be unlawful if it were established that the plaintiff's protected status or activity was a substantial or motivating factor in the employer's decision to take the adverse action. It would not be necessary to establish that the protected status or activity was the sole reason for the employer's decision to take the adverse action.

If it is established that the protected status or activity was a substantial or motivating factor in the employer's decision to take the adverse action, the employer can avoid liability by demonstrating that the adverse action would have been taken for lawful reasons in the absence of the protected status or activity. Under these circumstances, this would be considered to be an affirmative defense for which the employer would have the burden of proof.

This is simply a codification of the original intent of Congress when it enacted what is now 38 U.S.C. § 2021(b)(3) in 1968. *See Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services*, 89th Cong., 1st Sess. 5320 (Feb. 23, 1966). In 1986, when Congress amended Section 2021(b)(3) to prohibit hiring discrimination against Reserve and National Guard members, Congressman Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the legislative intent cited above, the courts in these discrimination cases should use the burden-of-proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) (citing *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983)).

Recently, the United States Court of Appeals for the Tenth. Circuit dealt with the burden-of-proof issue in the context of the discharge of a reservist. *See Sawyer* v. *Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988). To the extent that *Sawyer* can be read as requiring evidence that the reservist's military obligation was the sole reason for his discharge, that holding is inconsistent with the intent expressed above.

Subsection (c) makes it unlawful for an employer to take any adverse action against an employee or prospective employee because such person has filed a complaint or sought assistance concerning an alleged violation of the Act, has testified in any proceeding under the Act, has assisted or otherwise participated in an investigation under the Act, or has exercised any right under this Act. The burden-of-proof provisions of Section 2024(b) will apply to cases arising under Section 2024(c).

Section 2025

Source: 38 U.S.C. §§ 2021, 2024, greatly revised.

Under the current reemployment statute, entitlements and eligibility criteria depend to some extent upon the type of military training or service that is performed. As has been explained in the discussion of Section 2023, paragraph (9), *supra*, the Act eliminates unnecessary distinctions between types of military service. For example, the amount of time that the returning service member has to report back to his or her civilian job will now depend upon the duration of his or her service rather than the type. It is considered that this rule is more rational and equitable and easier to understand.

Under the current reemployment statute, a person is permitted to remain on active duty for up to four years and still have reemployment rights. *See* 38 U.S.C. §§ 2024(a), 2024(b). Voluntary enlistees are permitted to remain on active duty for up to five years if the period beyond four years is an extension "at the request and for the convenience of the Federal Government." *See* 38 U.S.C. § 2024(a). Under Section 2025(b) of the Act, the limit on duration would be five years. This is considered to be easier to understand than the current law's confusing "four plus one" limitation.

Section 2025(b) also provides that the duration of service in the uniformed services may be longer than five years under certain circumstances. Section 2025(b)(1) provides that the period of continuous active service may exceed five years if the additional time is necessary to complete an initial obligated service requirement. Because of very high training costs for some military specialties, such as the Navy's nuclear power program, the services sometimes impose active service obligations exceeding five years upon persons choosing those specialties. The intent of Section 2025(b)(1) is that a person leaving active duty upon completion of his or her initial active service obligation should have reemployment rights even if his or her period of continuous active service exceeded five years.

Section 2025(b)(2) provides that the period of continuous active service may exceed five years if the person was unable to obtain orders releasing him or her from active service through no fault of such person. This provision is similar to the existing reemployment statute. *See* 38 U.S.C. §§ 2024(a), 2024(b)(1) (final clause in each case).

During time of war or national emergency, a person may be involuntarily retained on active duty beyond his or her Expiration of Active Obligated Service (EAOS) date, which occurred to some persons in connection with Operation Desert Shield. Even in other times there are circumstances in which a person may be retained on active duty beyond his or her EAOS date. For example, the law provides that the EAOS date of a member of the Navy or Marine Corps serving on a vessel may be extended until the vessel returns to the United States if the EAOS date comes while the vessel is at sea. *See* 10 U.S.C. § 5540.

For another example, a person may be retained on active duty beyond his or her EAOS date if he or she is suspected of a military criminal offense. *See* 10 U.S.C. § 802(a)(1). If the member is retained on active duty for court-martial and then acquitted, or if military authorities later decide not to proceed with the charges, it shall be irrebuttably presumed that the member's inability to obtain orders releasing him or her from active service on his or her EAOS date was through no fault of such member.

Section 2025(b)(3) provides that service performed by a person called to active service during time of war or national emergency is excluded from the cumulative limit. This provision is not intended to limit the authority of the Secretary of Labor in Section 2025(c) to provide for other exclusions. Rather, the inclusion of Section 2025(b)(3) is intended to ensure that, at a minimum, service during these periods, including Operation Desert Shield/Storm, is excluded from the cumulative limit.

Under the current reemployment statute, the four-year limit on military service is cumulative in the sense that it includes all active duty performed "after entering the employment on the basis of which such person claims restoration or reemployment." 38 U.S.C. §§ 2024(a), 2024(b)(1). When a person starts a new job with a new employer, he or she receives a fresh entitlement to active duty, under the current reemployment statute and also under Section 2025(c) of the Act.

Under the current reemployment statute, only *active duty* counts toward the four-year limit, *not* active duty for training, inactive duty training, or initial active duty training. *See* 38 U.S.C. §§ 2024(c), 2024(d). As has been explained in connection with Section 2023, paragraph (9), *supra*, the Act generally eliminates distinctions among categories of military training or service.

There is a concern that the elimination of these distinctions, while maintaining the provision that the service limitation is cumulative, could cause a Reserve Component member to lose his or her reemployment rights because of even a short military training period, if he or she has already been reemployed after five years of military service. Such a result would disserve the Act's purpose, as stated in Section 2021, to encourage Reserve Component service. Accordingly, Section 2025(c) authorizes the Secretary of Labor, in regulations to be promulgated under Section 2033, to provide that certain categories of training and service will be excluded in computing the five-year cumulative limit. It is anticipated that periodic and special Reserve Component training as well as voluntary or involuntary service during a time of military exigency will be excluded from the five-year limitation.

Section 2025(d) sets forth the deadline for the returning servicemember to report to his or her preservice employer for reemployment. Under the current reemployment statute, the deadline depends upon the *category* of service but under Section 2025(d) the deadline will depend upon the *duration* of service or training. Section 2025(d) will be easier to understand and apply than the current reemployment statute.

Section 2025(e) (2) of the Act would extend the deadline to report for reemployment "by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within such time limits impossible or unreasonable." This is in accord with Section 2024(d) of the current reemployment statute, which similarly extends the deadline for returning from active duty for training or inactive duty training. An automobile accident or other transportation-related delay would be an example of a "circumstance beyond such person's control."

Under the current reemployment statute, the time limits for applying for reemployment after regular active duty (90 days) or after initial active duty for training (31 days) are eligibility requirements, meaning that a person who fails to meet those time limits (except in very limited situations, such as hospitalization, wherein the delay is excused) has no reemployment rights. On the other hand, under the current statute the deadline for returning to work after active duty for training or inactive duty training is not an absolute requirement. An employee who is late in returning to work after active duty for training or inactive duty training, without excuse, is not necessarily deprived of all reemployment rights, but he or she is subject to the employer's usual sanctions for tardiness or unexcused absence. Section 2025(f) would apply the present law's active duty for training rule to all types of military training or service.

Thus, if a person returning from service in the uniformed services exceeds the time permitted to report for reemployment, after release from service, the Federal district court, if the employer is a State or local government or a private employer, or the Merit Systems Protection Board (MSPB), if the employer is a department or agency in the Executive Branch of the Federal Government, will determine whether the delay should deprive the person of reemployment rights. The court or the MSPB will have three options:

a. Order immediate reinstatement.

b. Order reinstatement after a delay of a few days or weeks, corresponding to the employer's usual suspension-withoutpay period for a similar period of unexcused absence.

c. Deny reinstatement if the evidence shows that the employer normally discharges employees for a period of unexcused absence corresponding to the delay in the application for reemployment beyond the time permitted.

Section 2025(a) provides that a person is entitled to apply for reemployment "upon completion of service in the uniformed services under honorable conditions", and that phrase is specifically defined in Section 2023, paragraph (2), *supra*. Section 2025(g) provides procedures by which it may be established that a person returning from service in the uniformed services meets the "honorable conditions" criterion and the other eligibility criteria. Reserve and National Guard members completing short training periods do not normally receive documentation (such as a Department of Defense Form 214) establishing that their service was "honorable." The intent of Section 2025(g) is to prevent an employer from delaying reemployment by demanding documentation that does not exist or is not readily available.

Section 2025(h) is based upon Section 2024(c) of the current reemployment statute, and it applies only when the veteran's preservice employer is the Federal Government. it provides that a person returning from service in the uniformed services may not displace an employee with a superior claim under the Veterans' Preference Act, such as a disabled veteran. A returning veteran who finds his or her preservice position occupied by another veteran with a superior claim under the Veterans' Preference Act would have reemployment rights in some other position.

Section 2025(i) exempts an employer from the obligation to reemploy if doing so is "impossible or unreasonable" based upon the employer's changed circumstances. This provision is taken verbatim from the language of 38 U.S.C. § 2021(a). The courts have construed the present law's "changed circumstances" proviso as a very narrow affirmative defense for which the employer has the burden of proof. *See, e.g., Watkins Motor Lines, Inc.* v. *degalliford*, 167 F.2d 274, 275 (5th Cir. 1948). The identical provision in the new Act should be construed in a similarly narrow manner.

Section 2025(j) provides a means for notifying the administrator of a multiemployer pension plan that a contributing employer has reemployed a veteran under this chapter, under circumstances that might result in additional pension liability of the plan. Such a notification will provide the plan the opportunity to take whatever steps may be required to protect its interests. Unlike officials of single-employer pension plans, the administrators of multiemployer plans are generally not in a position to be aware of the fact that a contributing employer has reemployed a person who may also have pension claims arising from a preceding period of military service.

Section 2026

Source: 38 U.S.C. §§ 2021, 2024, and 2026, greatly revised.

Section 2026(a) (1) provides that a person returning from service in the uniformed services lasting fewer than 181 days is entitled to the precise position that he or she held before his or her service, unless that position no longer exists. This is in accordance with Section 2024(d) of the current reemployment statute, which covers reservists and National Guard members performing active duty for training or inactive duty training, and which gives such persons the right to return to the positions that they left in order to perform such training.

Section 2026(a)(2) applies to a person returning from 181 days or more of service in the uniformed services. The employer of such a person has the option of reemploying him or her in his or her preservice position or in another position of "like seniority, status, and pay." This is in accordance with the present law's treatment of active duty or initial active duty training. *See* 38 U.S.C. §§ 2021(a), 2024(a), 2024(b), 2024(c). As has been stated, entitlements and eligibility criteria under the Act generally depend upon the duration of service in the uniformed services, rather than the category of service. A person entitled to reemployment under Section 2026 is also entitled to seniority and other benefits under Section 2027.

Both Section 2026(a)(1) and Section 2026(a)(2) provide that the employer is required to reemploy the employee returning from service or training in the uniformed services "within time limits to be established in regulations to be promulgated by the Secretary under Section 2033 of this chapter." For example, within the Secretary's discretion, the regulations might give persons returning from up to 30 days of training or service the right to immediate reinstatement, while giving the employer one week to reemploy persons returning from 31–180 days of training or service and two weeks to reemploy persons returning from 181 days or more of service or training.

Section 2026(a)(2) gives the returning veteran the right to a job that is equivalent in status, as well as seniority and pay, to the job that he or she would have attained if continuously employed. This is similar to Section 2021(a)(B)(i) of the current reemployment statute. The word "status" is difficult if not impossible to define, but one element of status is a veteran's expressed desire to be reemployed in the same commuting area where his or her preservice job was located. *See, e.g., Britton* v. *Department of Agriculture*, 23 MSPR 170 (1984).

Section 2026(a)(3) covers returning disabled veterans and is largely a restatement of 38 U.S.C. §§ 2021(a)(A)(ii) and 2021(a)(B)(ii). Like the old provision, the new provision is intended to be liberally construed for the benefit of disabled veterans. *See, e.g., Hembree* v. *Georgia Power Co.*, 637 F.2d 423 (5th Cir. 1981); *Ryan* v. *City of Philadelphia*, 559 F. Supp. 783 (E.D. Pa. 1983), affld, 732 F.2d 147 (3d Cir. 1984). Section 2026(a)(4) of the Act provides similar protection for returning veterans who are not qualified for their preservice positions because of reasons other than physical disability.

The reach of Section 2026(a)(3) has been expanded, as compared to current law, in one important respect. Before reemploying a returning disabled veteran in a position with less seniority, status, and pay than that of his or her preservice job, the employer must first attempt to restore the veteran to his or her preservice position or a position of like seniority, status, and pay, making reasonable accommodations with respect to equipment, method of production, and the like. The duty to make accommodations is similar to the duty of Federal contractors to make accommodations for certain disabled veterans. *See* 41 C.F.R. § 60–250.6(d). If efforts to accommodate the disabled veteran in his or her preservice position are unsuccessful, the duty of the employer to search for an alternative position would then apply.

Section 2026(b) of the Act is almost a verbatim restatement of 38 U.S.C. § 2026 and is to be construed in a similar manner.

Section 2027

Source: 38 U.S.C. §§ 2021, 2024, greatly revised.

Section 2027(a)(1) provides that a person serving a period of service in the uniformed services of fewer than 31 days shall automatically be considered to have been continuously employed for all purposes other than pay for work performed. In other words, the employer is not required to pay such person for the period of time when he or she is not working because of service in the uniformed services, but the employer is required to continue providing insurance and other benefits as if the person were continuously employed. A purpose of this protection is to ensure that reservists and National Guard members do not lose health or life insurance benefits, for themselves or their dependents, because of typically brief training tours.

Section 2027(a)(2) provides that a person serving a longer period of service in the uniformed services is entitled, at his or her request and own expense, to be covered by insurance and other benefits provided by the employer for up to 18 months. This protection is similar to the continuation of health insurance under the Consolidated omnibus Budget Reconciliation Act of 1985, as amended (COBRA) (100 Stat. 222 at Title X). This protection, however, would apply to all individuals entering the uniformed services, without limiting qualifications such as the size of the person's employer. The last sentence in Section 2027(a)(2) is intended to allow any employer to continue to fund any percentage of the payments needed on a voluntary basis. This recognizes that, as occurred during Operation Desert Shield, some employers generously may choose to provide such coverage. In addition, as indicated in Section 2022(c), this protection is not intended to preempt any other rights or benefits such persons may have under any other statute.

In summary, as became more clear during operation Desert Shield, the continuation of health insurance coverage for the recalled Reserve Component members, and particularly for their families, was a major concern. Section 2027(a)(1) is intended to provide for the continuation of civilian health insurance coverage, through civilian employer arrangements, during short periods of service or training in the uniformed services. In the case of longer periods of service, Section 2027(a)(2) is intended to give the recallee the opportunity to continue receiving care using the civilian health insurance coverage until the recallee's family chooses to enroll in and begin using the military health care system, including the Civilian Health and Medical Program for the Uniformed Services (CHAMPUS). The effective date of these provisions, and their impact on those called to serve after August 1, 1990, is addressed in Section 2035(c) and the accompanying discussion in this sectional analysis.

As has been stated, the Act eliminates the current statute's distinctions among categories of military training or service, wherein the type of duty served results in being treated as though on a leave of absence or as a former employee. The effect of Section 2027(a) is to treat persons on short tours of service or training (up to 30 days, or up to 18 months if the person exercises the option provided by Section 2027(a)(2)) as being on leaves of absence, while persons serving longer tours are considered former employees with potential reemployment claims.

In its first case under the reemployment statute, the Supreme Court established the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]." *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284-85 (1946). The "escalator principle" was later codified at 38 U.S.C. § 2021(b)(2). Section 2027(b) recodifies the "escalator principle."

Section 2027(b) also is intended to ensure that when a person leaves a civilian job for duty or training in the uniformed services and returns to employment under this chapter, he or she shall be accorded health insurance coverage through his or her civilian employment beginning on the first day after return to employment. There should be no lapse in coverage, no waiting period, and no exclusion for preexisting conditions, either for the employee or for his or her dependents, as indicated by the Department of Labor interpretation of the existing reemployment statute. Section 2027(b) thus would foreclose any reliance upon *Gentile* v. *United States Trucking Corp.*, 355 F. Supp. 960 (S.D.N.Y. 1973), affld, 489 F.2d 752 (2d Cir. 1974), to reach a contrary result. Of course, the uniformed services themselves and the Department of Veterans Affairs will provide health care for service-connected disabilities.

Section 2027(c) carries over the "furlough or leave of absence" clause that is contained in Section 2021(b)(1) of the current reemployment statute, and the new provision is intended to be construed in the same manner as the old provision. The entitlements provided by this subsection are in addition to, not instead of, the entitlements provided by the "escalator principle." The right to any additional benefits under this section will be determined in accordance with the collective bargaining agreement or other employer rules in effect at the time the claim for benefits accrues.

Under the current reemployment statute, a reservist or National Guard member must notify his or her employer before leaving work for active duty for training or inactive duty training [*See* 38 U.S.C. § 2024(d).], but it is not necessary to notify the employer before leaving for active duty or initial active duty training [*See* 38 U.S.C. §§ 2021(a), 2024(a), 2024(b), 2024(c).]. Section 2027(d) of the Act requires the employee to give the employer advance notice of service in the uniformed service regardless of the type of service.

Section 2027(d) also provides that the employee is excused from the requirement to give his or her employer advance notice if doing so is impossible or unreasonable because of military necessity or for other reasons. During the 1983 Grenada operation, for example, members of the National Guard and Reserve were called to active duty with almost no notice, and notifying their civilian employers was impossible without jeopardizing military security. Section 2027(d) is intended to make it clear, in unambiguous language, that the determination as to whether military necessity precluded notification shall be made by the uniformed services and shall not be subject to judicial review.

The requirement to give notice to one's employer in advance of service in the uniformed services should not be construed to require the employee to decide, at the time he or she leaves a job, whether he or she will want to seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the service member's civilian job as an "unburned bridge." Until his or her release from service, the service member is not required to decide whether to recross that bridge. Section 2027(d)'s notice requirement is not intended to change this basic, and important, concept.

Section 2027(e) carries over the provisions for special protection against discharge without cause that are presently found at 38 U.S.C. §§ 2021(b)(1) and 2024(c), and this subsection is intended to be construed in a similar manner. This protection has two purposes:

a. To give the returning veteran a reasonable time to regain civilian skills; and

b. To protect the veteran from a bad faith or *pro forma* reinstatement.

Under the current reemployment rights statute, the period of special protection is one year after active duty and six months after initial active duty for training. *Compare* 38 U.S.C. § 2021(b)(1) *with* 38 U.S.C. § 2024(c). The current statute does not contain an explicit provision for special protection against discharge without cause following active duty for training or inactive duty training. Under Section 2027(e) of the Act, the duration of the period of special protection will depend upon the duration of the service in the uniformed services, rather than the type of service, and Section 2027(e) includes protection for reservists or Guard members returning from training duty.

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of rights under the Act. *See Oakley* v. *Louisville and Nashville Railroad Co.*, 338 U.S. 278 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in Section 2024(a) of the Act. The principal effect of Section 2027(e) is to shift the burden of proof to the employer during the period of special protection. After the expiration of the period of special protection, the burden of proof returns to the employee, except in those circumstances where Section 2024(b) shifts the burden of proof to the employer.

on the other hand, the period of special protection does not protect the reinstated veteran from a *layoff* during the special protection period, based upon seniority, if the veteran has been given credit for his or her preservice seniority and military service but the layoffs have reached his or her place on the seniority roster because of the employer's reduced need for work. *See Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275 (1946). The Act was not intended to overrule *Fishgold*.

Sections 2027(f) and (g) govern the entitlements of reemployed veterans to pension and deferred compensation benefits attributable to their periods of military service. These sections are consistent with Supreme Court precedent under the current reemployment statute. *See Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977).

Section 2027(f)(1) protects the reemployed person against forfeiture of benefits already accrued under the terms of a pension benefit plan, and against the necessity of requalifying for participation in the plan, by reason of absence for military service. Section 2027(f)(2) requires that the period of military service also be considered as service with the employer for purposes of determining additional vesting of accrued benefits that would have occurred by reason of such service with the employer. In addition, Section 2027(f)(2) provides, in the case of a plan other than an individual account plan (under which a participant's benefits are derived solely from amounts contributed to his or her account), that benefits continue to accrue during the period of military service. If the plan is contributory (*i.e.*, it provides for employee contributions as well as employer contributions), the portion of such accrued benefit that is derivable from employee contributions is required to be provided only to the extent that the reemployed veteran makes the required contribution to the plan (Section 2027(g)(2)).

Section 2027(f)(2) also provides that the right to accrue benefits based upon an employee's period of service in the uniformed services applies only if the employee is covered by a defined benefit pension plan. If the employee is a participant in a defined contribution plan, the employee's period of service in the uniformed services will be treated as service with the employer or employers for purposes of vesting but not for purposes of benefit accrual. The exception of defined contribution plans (such as profit-sharing plans) from the obligation to provide benefit accruals was made because such accruals represent the contributions actually made to the plan participants' individual accounts, and are more properly characterized as current compensation than as perquisites of seniority.

Section 2027(g)(1) is intended to provide the plan with a claim against the employer for amounts that may be required to fund obligations arising under Section 2027(f). In the case of a multiemployer plan, this provision enables the plan to pursue its existing remedies under Section 515 of the Employee Retirement Income Security Act, 29 U.S.C. § 1145, for failure to make the required contributions, in the event that neither the plan nor the collective bargaining agreement pursuant to which the plan is maintained provides for any such funding obligations.

SUBCHAPTER III—PROCEDURES FOR ASSISTANCE AND ENFORCEMENT

Section 2028

Source: 38 U.S.C. § 2025, amended.

Section 2028 applies to situations wherein the employer or prospective employer is a State or subdivision thereof or a private employer. Section 2028(a) is the same as 38 U.S.C. § 2025, except for three minor changes in wording. The "Veterans' Employment and Training Service" is substituted for the "Office of Veterans' Reemployment Rights" as the Department of Labor office responsible for providing assistance, "entitled to rights and benefits under this chapter" is substituted for "satisfactorily completed any period of active duty", and "uniformed services" is substituted for "Armed Forces."

Section 2028(b) is a new provision. This provision is intended to provide assistance to persons whose rights are about to be violated. The assistance would be informational and might include counseling the person and the employer about the law before a right or benefit has been denied. After a right or benefit has been denied, assistance could also include an investigation of the claim. An example would be a reservist who has notified his or her employer that he or she will be absent from work while attending military training, and who has been told not to expect to find a job when he or she gets back. Such a reservist should be afforded assistance before he or she leaves the job or while he or she is away, if he or she requests such assistance and provided it is feasible.

Section 2028(c) refers to legal representation for persons claiming rights under this Act with respect to private sector employers or State or local governments as employers. Section 2022 of the current reemployment statute assigns to the appropriate United States Attorney the responsibility to assist a claimant seeking reemployment rights if the United States Attorney is reasonably satisfied that the claimant is entitled to the benefits that he or she seeks. Section 2028(c) assigns to the Attorney General the authority to determine whether the Federal Government will provide legal representation. Such a determination shall be made after the Secretary of Labor has completed an investigation and after efforts to resolve the claim through conciliation have been unsuccessful.

The determination as to whether the Attorney General shall offer legal representation to a claimant under this Act shall be made upon an assessment of the merits of the claimant's case. If the Attorney General determines that the Federal Government shall provide legal representation, the Attorney General shall assign responsibility for providing legal representation to the appropriate United States Attorney or to a Department of Justice attorney, or, as is suitable, to the Solicitor of Labor. In addition, other attorneys may be designated as necessary.

If the Attorney General declines to provide representation, or if for any reason the claimant does not desire to be represented by the Federal Government, the claimant may file suit through private counsel retained at his or her own expense or *pro se*. This is in accordance with the practice under the existing reemployment statute.

Section 2029

Source: 38 U.S.C. § 2023, amended.

Section 2029(a) makes it clear that the reemployment obligation applies to the Federal Government just as it applies to any other civilian employer.

Section 2029(b) and Section 2029 (c) are new provisions intended to provide assistance and legal representation to Federal employees and former Federal employees who claim reemployment rights. The intent is to provide Federal employees and former Federal employees the same kind of assistance in securing their reemployment rights as is provided to persons claiming reemployment rights with State or local governments or private employers. Under Section 2029(b), the Department of Labor (DOL) will provide assistance to persons whose rights are about to be violated. This assistance would be informational and may include counseling the person and employer about the law before a right or benefit has been denied. After a right or benefit has been denied, assistance could also include an investigation of the claim. Under Section 2029(c), the Office of Special Counsel (OSC) shall represent Federal employees and former Federal employees before the Merit Systems Protection Board (MSPB).

Section 4 of this Act enacts an entirely new chapter 92 of Title 5. That chapter provides for the enforcement of Chapter 43 of Title 38 with respect to the Federal Government as an employer. Section 9204 of that chapter, together with Section 2029(b) of this chapter, deals with representation of Federal employees and former Federal employees claiming reemployment rights.

The relationship between DOL and the OSC with respect to Federal sector claims shall be similar to the relationship between DOL and the Attorney General with respect to claims involving private employers or State or local governments. The OSC shall represent a Federal sector claimant if the claimant requests OSC assistance and if the OSC is reasonably satisfied that the claimant is entitled to the benefits that he or she seeks. If the claimant does not wish to have OSC representation, or if the OSC is not reasonably satisfied that the claimant is entitled to the benefits that he or she seeks, the claimant may appeal to the MSPB on his or her own behalf or through private counsel retained at his or her own expense, as provided in Section 2030 and 5 U.S.C. § 9202. Care should be exercised to ensure that the claimant has the opportunity to appeal to the MSPB even if the OSC declines his or her request for representation, because of the limited time available to appeal to the MSPB.

The OSC shall provide representation before the MSPB but not before the Federal Circuit Court of Appeals or the Supreme Court, on appeal from the MSPB. A person claiming reemployment rights with respect to the Federal Government as employer may appeal to the Federal Circuit Court of Appeals from an adverse MSPB determination. *See* Section 9203, Chapter 92, Title 5, United States Code, as enacted in Section 4 of the Act, *infra*. However, such a person will need to retain private counsel at his or her own expense.

Section 2029(d), like section 2023(a) of the current reemployment statute, applies to the situation of the former Federal employee, returning from military service, who finds that the Federal agency for which he or she worked no longer exists or finds that the agency that employed him or her claims that it is infeasible to reemploy him or her, for a sufficient reason. In such a situation, the Director of the Office of Personnel Management (OPM) will be responsible for identifying another position in the Executive Branch of the Federal Government and causing the veteran to be reemployed in that position.

The current statute requires the Director of OPM to "determine whether or not there is" such a position. Section 2029(d) instead requires the Director to "identify" such a position. Somewhere in the Executive Branch of the Federal Government, there must be a position in which to reemploy a former Federal employee returning from military service, even if the specific agency that previously employed him or her no longer exists or finds it infeasible to reemploy him or her. If OPM cannot locate a position which is fully equivalent in terms of seniority, status, and pay to the position that the veteran occupied before his or her military service, then OPM should identify the closest approximation consistent with the veteran's qualifications and the circumstances of his or her case.

Section 2029(e), like Sections 2023(b) and 2023(c) of the current reemployment statute, applies to returning veterans who were employed by the Legislative Branch or the Judicial Branch of the Federal Government prior to their military service. Such persons should apply to their preservice employers for reemployment rights. If those Legislative Branch or Judicial Branch employers find it infeasible to reemploy such returning veterans, OPM should identify for them positions in the Executive Branch, as discussed above.

Section 2030

Source: New

Section 2030 gives to the Merit Systems Protection Board (MSPB) the jurisdiction to decide contested cases about Federal sector reemployment rights, including cases brought by former Federal employees and employees or former employees of nonappropriated fund instrumentalities of the United States. MSPB determinations will be reviewable by the United States Court of Appeals for the Federal Circuit in the same manner that MSPB determinations generally are reviewable. *See also* Chapter 92 of Title 5, United States Code, as enacted by Section 4 of this Act.

Section 2031

Source: 38 U.S.C. §§ 2022 and 2025, amended.

Subsections (a) and (b) provide for initiating a complaint against a private employer or a State or local government by filing a written complaint with the Department of Labor.

Subsection (c) defines the jurisdiction of the Federal District Courts in reemployment cases and is taken directly from Section 2022 of the current reemployment statute. The provision for representation of veterans by the United States Attorney has been removed because Section 2028(c), *supra*, provides for legal representation.

Section 2031(c)(4) has been added to make it clear that only employees or prospective employees, and not employers, have standing to initiate actions under this Act. The intent is to overturn the jurisdictional holding of *Gulf States Paper Corp.* v. *Ingram*, 811 F.2d 1464, 1466–67 (11th Cir. 1987).

SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS AGAINST A STATE OR PRIVATE EMPLOYER

Section 2032

Source: 15 U.S.C. § 49

The reemployment statute has not previously given the Department of Labor administrative subpoena authority, although the Department has such authority under most statutes that it is charged with enforcing. This subpoena provision is typical of many such provisions in regulatory statutes. Some reemployment investigations have lasted more than one year, and it is considered that the lack of subpoena authority has been an important reason for such inordinate delays. It is expected that this new authority will make it possible for the Department of Labor to enforce reemployment rights in a more timely and effective manner. The subpoena authority may be used to investigate claims after a right or benefit has been denied.

SUBCHAPTER V—MISCELLANEOUS PROVISIONS

Section 2033

Source: New

Section 2033(a) gives the Secretary of Labor the authority to promulgate regulations to carry out the policies of this Act. The Department of Labor has not previously had such authority, although several courts, including the Supreme Court, have given a "measure of weight" to the statutory interpretations expressed in the Department's *Veterans' Reemployment Rights Handbook. See, e.g., Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 563 n.14 (1981); *Shadle* v. *Superwood Corp.*, 858 F.2d 437, 440 (8th Cir. 1988); *Dyer* v. *Hinky Dinky, Inc.*, 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith* v. *Industrial Employers and Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Helton* v. *Mercury Freight Lines, Inc.*, 444 F.2d 365, 368 n.4 (5th Cir. 1971). It is anticipated that the Department of Labor will promulgate regulations in an expeditious manner.

Section 2033(b) is based upon Section 2023(a) of the current reemployment statute, which assigns to the Director of OPM the authority and responsibility to "issue regulations giving full force and effect to the provisions of this section" for the Executive Branch of the Federal Government. The current regulations may be found in Part 353 of Title 5 of the *Code of Federal Regulations.*

The Federal Government should be a model employer with respect to the policies of this Act. In order to make that intent a reality, Section 2033(b) requires that the OPM regulations under this Act be consistent with the Department of Labor regulations on State and local governments and private employers and also requires that the Director of OPM consult with the Secretary of Labor and the Secretary of Defense before promulgating such regulations.

Section 2034

Source: New

Section 2034 provides that if any provision of this chapter is declared invalid, the remainder of the chapter shall not be affected. This is a standard "severability clause."

Section 2035

Source: New

Section 2035(a) provides that the requirement to give notice to one's employer prior to service in the uniformed services, as contained in Section 2027(d), *supra*, shall not apply to military service that is already in progress on the date of enactment of this Act. Under the current reemployment statute, it is not necessary to notify one's employer before leaving a job for active duty or initial active duty for training. *See* 38 U.S.C. §§ 2021(a), 2024(a), 2024(b), 2024(c). It would be unfair to apply the notice requirement to a person who entered active duty prior to the enactment of this Act because such a requirement did not exist in the law at the time such servicemember left his or her civilian job.

Section 2035(b) provides that the provisions of Sections 2025(j) and 2027(g) pertaining to pensions shall be effective on the date of enactment. These provisions impose obligations upon employers which cannot fairly be applied retroactively. On the other hand, Section 2027(f), which also deals with pensions, is simply a restatement of clear requirements under the current reemployment statute. *See Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977). Accordingly, applying Section 2027(f) retroactively to August 1, 1990 is not unfair.

Similarly, Section 2035(c)(1) provides that the provisions of Section 2027(a), pertaining to insurance coverage and similar benefits, shall be effective on the date of enactment, except as provided in Section 2035(c)(2). Section 2035(c)(2) applies to persons who entered active service in the uniformed services after August 1, 1990 but prior to the date of enactment of this Act. Such a person or his or her agent will be given the opportunity, after the date of enactment of this Act, to make an election similar to that envisioned by Section 2027(a)(2). Such coverage, if elected, would be effective up to the end of the 18-month period that began when the person left civilian employment. If such an election is made, employers would be required to make available, at the person's expense, the reinstatement or continuation of the person's insurance coverage and other benefits. Section 2035(c)(2) is intended to ensure that persons who entered active duty in support of Operation Desert Shield/Storm receive a benefit like that accorded to persons entering active duty after the date of enactment of this Act.

Section 2035(d) preserves rights and benefits accrued under the existing reemployment statute.

SECTION 3: AMENDMENTS TO OTHER CHAPTERS OF TITLE 38

Section 3 of the Act amends chapters of Title 38, United States Code, other than Chapter 43. Subsections (1) and (2) make technical amendments to 38 U.S.C. §§ 2001(5) and 3103(b)(3). The amendment to section 2001(5) makes members of reserve components of the Armed Forces eligible for certain employment assistance services administered by the United States Department of Labor and by the State Employment Security Agencies.

SECTION 4: AMENDMENTS TO TITLE 5, UNITED STATES CODE

Section 4 makes technical amendments to Title 5 and also enacts an entirely new chapter, Chapter 92, in that Title. The new chapter is intended to provide an efficacious and expeditious enforcement mechanism for Chapter 43 of Title 38 with respect to the Federal Government as an employer. Chapter 92 is discussed in connection with Sections 2029 and 2030 of Title 38, *supra*.

SECTIONS 5 AND 6: TECHNICAL AMENDMENTS

Sections 5 and 6 of the Act make technical amendments to several sections in Titles 10 and 28, United States Code. Section 6 repeals 28 U.S.C. § 631(j), which provides reemployment rights for Federal magistrates. That provision is deemed redundant in view of Chapter 43 of Title 38, as amended by this Act.

SECTION 7: EFFECTIVE DATE

Section 7 of this Act makes the effective date of the Act August 1, 1990, in order to ensure that the Act's protections will apply to those called to serve in support of Operation Desert Shield/Storm. Reference should also be made to the transitional provisions contained in Section 2035 of Title 38, as enacted by this Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

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PART I—GENERAL PROVISIONS

CHAPTER	Sec.
1. General	101

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PART III—READJUSTMENT AND RELATED BENEFITS

30. All-Volunteer Force Educational Assistance Program	1401

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[43. Veterans' Reemployment Rights	2021]
43. Employment and Reemployment Rights of Members of the Uniformed Services	*2021*

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PART III—READJUSTMENT AND RELATED BENEFITS

CHAPTER Sec.
30. All-Volunteer Force Educational Assistance Program . 1401

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[43. Veterans' Reemployment Rights.. 2021]
43. Employment and Reemployment Rights of Members of the Uniformed Services.. 2021

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[CHAPTER 43—VETERANS' REEMPLOYMENT RIGHTS

[Sec.
[2021. Right to reemployment of inducted persons; benefits protected.
[2022. Enforcement procedures.
[2023. Reemployment by the United States, territory, possession, or the District of Columbia.
[2024. Rights of persons who enlist or are called to active duty; Reserves.
[2025. Assistance in obtaining reemployment.
[2026. Prior rights for reemployment.
[2027. Qualification for employment position.

[§ 2021. Right to reemployment of inducted persons; benefits protected

[(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

[(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

[(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored to such position or to a position of like seniority, status, and pay; or

[(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

[(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

[(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

[(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

[(b)(1)(A) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

[(B) In the case of employer-offered health insurance, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a person entitled to participate in that insurance under subparagraph (A), or a health or physical condition of any other person who is covered by the insurance by reason of the coverage of such person, if—

[(i) the condition arose before or during that person's period of training or service in the Armed Forces;

[(ii) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the insurance; and

[(iii) the condition of such person has not been determined by the Secretary to be service-connected.

[(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

[(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

[(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

[§ 2022. Enforcement procedures

[If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or 2024 of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.

[§ 2023. Reemployment by the United States, territory, possession, or the District of Columbia

[(a) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) and who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by any territory or possession, or political subdivision thereof, or by the District of Columbia, shall be so restored or reemployed by such agency or the successor to its functions, or by such territory, possession, political subdivision, or the District of Columbia. In any case in which, upon appeal of any person who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by the District of Columbia, the Director of the Office of Personnel Management finds that—

[(1) such agency is no longer in existence and its functions have not been transferred to any other agency; or

[(2) for any reason it is not feasible for such person to be restored to employment by such agency or by the District of Columbia; the Director shall determine whether or not there is a position in any other agency in the executive branch of the Government or in the government of the District of Columbia for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists or by the government of the District of Columbia, as the case may be. The Director is authorized and directed to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to or employed in positions in the executive branch of the Government or in the government of the District of Columbia, including persons entitled to be reemployed under the last sentence of subsection (b) of this section. The agencies in the executive branch of the Government and the government of the District of Columbia shall comply with such rules, regulations, and orders issued by the Director pursuant to this subsection. The Director is authorized and directed when the Director finds, upon appeal of the person concerned, that any agency in the executive branch of the Government or the government of the District of Columbia has failed or refuses to comply with the provisions of this section, to issue an order specifically requiring such agency or the government of the District of Columbia to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amounts received by such person through other employment, unemployment compensation, or readjustment allowances. Any such compensation ordered to be paid by the Director shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions, and shall be paid by the head of the agency concerned or by the government of the District of Columbia out of appropriations currently available for salary and expenses of such agency or government, and such appropriations shall be available for such purpose. As used in this chapter, the term "agency in the executive branch of the Government" means any department, independent establishment, agency, or corporation in the executive branch of the United States Government (including the United States Postal Service and the Postal Rate Commission).

[(b) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) of this title, and who was employed, immediately before entering the Armed Forces, in the legislative branch of the Government, shall be so restored or employed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces. In any case in which it is not possible for any such person to be restored to or employed in a position in the legislative branch of the Government and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5, the Director of the Office of Personnel Management shall, upon appeal of such person, determine whether or not there is a position in the executive branch of the Government for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists.

[(c) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) of this title and who was employed, immediately before entering the Armed Forces, in the judicial branch of the Government, shall be so restored or reemployed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces.

[§ 2024. Rights of persons who enlist or are called to active duty; Reserves

[(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

[(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

[(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

[(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title 5 relating to veterans and other preference eligibles.

[(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

[(e) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or determining, by a preinduction or other examination, physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's preinduction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

[(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or section 206, 301, 309, 402, or 1002 of title 37 is considered inactive duty training.

[(g) Any member of a Reserve component of the Armed Forces of the United States who is ordered to active duty (other than for training) under section 673b of title 10, United States Code, whether or not voluntarily, shall be entitled to all reemployment rights and benefits provided under subsection (c) of this section for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks; and shall have the service limitation governing eligibility for reemployment rights under subsections (a) and (b)(1) of this section extended by the period of such active duty, including any period of extension of active duty under section 673b of title 10.

[§ 2025. Assistance in obtaining reemployment

[The Secretary of Labor, through the Office of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service. In rendering such aid, the Secretary shall use existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.

[§ 2026. Prior rights for reemployment

[In any case in which two or more persons who are entitled to be restored to or employed in a position under the provisions of this chapter or of any other law relating to similar reemployment benefits left the same position in order to enter the Armed Forces, the person who left such position first shall have the prior right to be restored thereto or reemployed on the basis thereof, without prejudice to the reemployment rights of the other person or persons to be restored or reemployed.

[§ 2027. Qualification for employment position

[(a) For the purposes of this chapter, a person shall be considered qualified to perform the duties of an employment position if such person, with or without reasonable accommodation, can perform the essential functions of the position.

[(b) For the purposes of subsection (a) of this section, an employer shall be required to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such employer.

[(c) For purposes of subsection (a) and (b) of this section—

[(1) the term "employer" means—

[(A) until July 26, 1994, a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person; and

[(B) on and after July 26, 1994, a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person;

[except that such term does not include the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a bona fide private membership club (other than labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986; and

[(2) the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in paragraphs (9) and (10), respectively, of section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 (9) and (10)).

[(d) Nothing in this chapter shall be interpreted to limit in any way any of the rights conferred by the Americans with Disabilities Act of 1990.]

CHAPTER 43—EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

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SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

§ 2021. Purposes

The purposes of this chapter are—

(1) to encourage noncareer service in the uniformed services of the United States by eliminating or minimizing those disadvantages to civilian careers and employment which would not occur but for such service; and

(2) to minimize the disruption to the lives of individuals performing service in the uniformed services, as well as minimizing the disruption to employers, to fellow employees, and to the community, by providing for the prompt reemployment of per-

sons completing service in the uniformed services under honorable conditions.

§ 2022. Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance) or any plan provided by an employer which establishes rights or benefits which are greater than or in addition to those provided in this chapter.

(b) This chapter supersedes State laws (including any local law or ordinance), employer practices, agreements, and plans, and other matters that reduce, limit, or eliminate in any manner rights or benefits provided by this chapter, including the establishment of additional prerequisites to the exercise of such rights.

§ 2023. Definitions

For the purposes of this chapter:

(1) The term "Attorney General" means the Attorney General of the United States or any person designated by the Attorney General to carry out an activity under this chapter.

(2) The term "benefit', "benefit of employment', or "employment related rights and benefits" means any aspect of the employment relationship, other than wages or salary for work performed, provided by contract or employer practice or custom, that offers advantage, profit, privilege, gain, status, account, or interest and includes, but is not limited to, pension plans and payments, insurance coverage and awards, employee stock ownership plans, bonuses, severance pay, supplemental unemployment benefits, vacations, and selection of work hours or locations of employment.

(3) The term "completion of service in the uniformed services under honorable conditions" means the completion of a period of service in the uniformed services in all circumstances except—

(A) receiving a dishonorable discharge, dismissal, or bad conduct discharge adjudged under chapter 47 of title 10;

(B) being discharged under other than honorable conditions, under regulations prescribed by the Secretary of Defense or a Secretary concerned; or

(C) being dismissed from or dropped from the rolls of a uniformed service under section 1161 of title 10.

(4)(A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or entity paying salary or wages for work performed or having control over employment opportunities, including—

(i) any person, institution, organization, or entity to whom the employer has delegated employment-related responsibilities; and

(ii) the Federal Government, any State or political subdivision thereof, and any private employer (including successors in interest).

(B) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall

be deemed to be an employer only with respect to the obligation to provide benefits described in section 2034(f).

(C) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the Adjutant General of the State in which the technician is employed.

(5) The term "Federal Government" includes the executive branch, the judicial branch, and the legislative branch, with the executive branch including—

(A) any department, administration, agency, commission, board, or independent establishment in, or other part of, the executive branch (including any executive agency as defined in section 105 of title 5);

(B) the United States Postal Service and the Postal Rate Commission;

(C) any nonappropriated fund activity of the United States; and

(D) any corporation wholly owned by the United States.

(6) The term "notice" means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

(7) The term "other than a temporary position" means a position of employment as to which there is a reasonable expectation that it will continue indefinitely.

(8) The term "qualified" means having the ability to perform the essential tasks of an employment position.

(9) The term "reasonable efforts" means actions, including training provided by an employer, that do not create an undue hardship on the employer.

(10) The term "Secretary" means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.

(11) The term "seniority" means longevity in employment together with any benefits of employment which accrue with or are determined by such longevity.

(12) The term "service in the uniformed services" means duty performed in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and the period of time an employee is absent from employment for the purpose of examination to determine fitness for such duty.

(13) The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

(14) The term "uniformed services" means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard, including the reserve components thereof, the Army National Guard and the Air National Guard when engaged in active duty for training or in inactive duty for training, the commissioned

corps of the National Oceanic and Atmospheric Administration, the commissioned corps of the Public Health Service, the Merchant Marine during time of war, national emergency, or when deemed necessary by the Secretary of Defense in the interest of national defense, and any other category of persons designated by the President in time of war or national emergency.

SUBCHAPTER II—PROHIBITIONS, RIGHTS, AND LIMITATIONS

§ 2031. Discrimination against members of the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, was a member of, applies to become a member of, or has an obligation to a uniformed service shall not be discriminated against because of such present or past membership, application for membership, or obligation by being denied initial employment, reemployment, continuation of employment, promotion, or any benefit of employment.

(b)(1) It shall be unlawful for an employer to discriminate against, discipline, or to take any other action of reprisal against any person because such person has filed a complaint or sought assistance concerning an alleged violation of this chapter, has testified in any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised any right afforded by this chapter.

(2) The prohibition in paragraph (1) shall apply with respect to employment, reemployment, continued employment, promotions, and any benefit of employment and shall apply regardless of whether the person with respect to whom the acts are performed has ever served in the uniformed services.

(c) A person shall be considered to have been denied employment, reemployment, continued employment, any promotion or benefit of employment in violation of this chapter if the person's status or activity protected by this chapter was a motivating factor, although not necessarily the only factor, in the employer's decision to deny the person employment, reemployment, continued employment, or any promotion or benefit of employment, unless the employer can demonstrate that the same decision would have been made in the absence of the protected status or activity.

§ 2032. Rights of persons absent from employment to serve in the uniformed services; limits on right

(a) Except as otherwise provided in this chapter, any person who is absent from or leaves a position (other than a temporary position) in the employ of any employer for voluntary or involuntary service in the uniformed services is entitled to a leave of absence or is entitled, upon completion of service in the uniformed services under honorable conditions, to—

(1) reemployment by such employer, unless such employer's circumstances have so changed as to make it impossible or unreasonable to do so; and

(2) employment related rights and benefits, as provided in this chapter.

(b) Subsection (a) shall apply if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 270 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined by the Secretary concerned to be necessary for professional development or for completion of skill training or retraining;

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section 672(a), 672(g), 673, 673b, 673c, or 688 of title 10;

(B) ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 673b of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 3500 or 8500 of title 10; or

(5) any other category of service specified by the Secretary, in consultation with the Secretary of Defense, in regulations prescribed pursuant to section 2061.

(c) Upon completion of service in the uniformed services under honorable conditions, a person returning from a leave of absence or otherwise entitled to reemployment under this section shall, in order to retain the member's rights under this chapter except as otherwise expressly provided, report to such person's employer for reemployment—

(1) at the beginning of the first regularly scheduled working period on the first calendar day following completion of such service and the time for safe transportation back to the member's residence and to the member's place of employment—

(A) if such person's period of service was less than 31 days; or

(B) if such person's service was for the purpose of examination to determine such person's fitness to enter service in the uniformed services, regardless of the length of such service;

(2) not later than 14 days following completion of such service and transportation, if such person's period of service was 31 days or more but less than 181 days; or

(3) not later than 90 days following completion of such service and transportation, if such person's period of service was 181 days or more.

(d) The time limits specified in subsection (c) for a person to report for employment or reemployment shall be extended—

(1) by up to one year if the person is hospitalized or is convalescing from an illness or injury incurred in military service;

(2) by up to two years if the person is a special disabled veteran described in section 2011(1)(A)(i) whose disability significantly impairs the veteran's ability to work and if such person informs, in writing or verbally, the employer concerned of the person's condition, intention to return to employment, and plans for and progress in rehabilitation; or

(3) by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the time limit specified in paragraphs (1) and (2) impossible or unreasonable.

(e) A person who fails to report for employment or reemployment within the time limits specified in subsection (c) does not automatically forfeit such person's right under subsection (a) but shall be subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

(f)(1) When reporting for reemployment upon release from service in the uniformed services, a person, upon request, shall provide to the person's employer such documentation, if any, as is then readily available to establish that the person's application is timely, that the person has not exceeded the service limitations set forth in subsection (b), and that the person completed service in the uniformed services under honorable conditions. Documentation from any official source that these criteria have been met shall satisfy the documentation requirements established by this subsection.

(2) It shall be unlawful for an employer to delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(h) Any employer who reemploys a person under this chapter and who is an employer contributing to any multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(37)), under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of every such reemployment, provide notice of such reemployment to the administrator of every such plan.

(i) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service or the nature of such training or service (including voluntary service) in the uniformed services shall not be a

basis for denying protection of such training or service if the service does not exceed the limitations set forth in subsection (b) and the notice requirements established in section 2034(d) are met.

§ 2033. Position to which entitled upon reemployment

(a) Except as otherwise provided in this chapter, a person who is entitled to reemployment under section 2032 shall—

(1) if such person's period of service was fewer than 181 days—

(A) first, be employed promptly in the position which such person would have attained by remaining continuously employed by such employer, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer; or

(B) if not employed under subparagraph (A), be employed promptly in the same position which such person left for service in the uniformed services, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer;

(2) if such person's period of service was 181 days or more—

(A) first, be employed promptly in the position which such person would have attained by remaining continuously employed by such employer or in another position which is equivalent in seniority, status, and pay to such position, unless the employer can demonstrate that such person is not qualified for such position or any equivalent position and cannot become qualified with reasonable efforts by such employer; or

(B) if not employed under subparagraph (A), be employed promptly in the same position which such person left for service in the uniformed services or in another position which is equivalent in seniority, status, and pay to such position, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer; or

(3) if disabled because of a disability incurred during, or as a result of, a period of service in the uniformed services, and if, after reasonable efforts by the employer to accommodate the disability, such person is not qualified due to such disability to be employed in the position the person would have attained if the person had remained continuously employed by such employer or in the position which such person left for service in the uniformed services, be employed promptly—

(A) in any other position which is equivalent in seniority, status, and pay and for which the person is qualified or would become qualified with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation thereof consistent with circumstances of such person's case; or

(4) if such person is not qualified to be employed in the position the person would have attained if the person had remained

continuously employed by such employer or in the position which such person left for service in the uniformed services for any reason other than disability incurred during a period of service in the uniformed services and cannot become qualified with reasonable efforts by the employer, be employed promptly in any other position of lesser status and pay which such person is qualified to perform, with full seniority.

(b) If two or more persons are entitled to reemployment under section 2032 in the same position and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to be reemployed in that position. Any person not reemployed in a position because of the application of the preceding sentence is entitled to be employed promptly—

(1) in any other position which is equivalent in seniority, status, and pay and for which the person is qualified or would become qualified with reasonable efforts by the employer; or

(2) if not employed under paragraph (1), in a position which is the nearest approximation thereof consistent with circumstances of such person's case.

§ 2034. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had at the time such person left the job concerned for service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b) A person who performs service in the uniformed services is considered to be on a leave of absence while in the uniformed services and is also entitled to such other rights and benefits, not determined by seniority, relating to other employees on furlough or leave of absence which were established, by contract, policy, or practice, at the beginning of such period of service or while such person is performing such service. Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to the preceding sentence.

(c)(1) A person who performs service in the uniformed services shall, at such person's request, continue to be covered by insurance provided by such employer for up to 18 months. Such person may be required to pay the entire cost of any benefit continued pursuant to the preceding sentence, except that in the case of persons ordered to training or service for fewer than 31 days, such person may be required to pay only the employee share, if any, of the cost of such benefit.

(2) In the case of employer-sponsored health benefits, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a person entitled to participate in these benefits, either under paragraph (1) or upon reinstatement, or a health or physical condition of any other person who is covered by the benefits by reason of the coverage of such person, if—

(A) the condition arose before or during that person's period of training or service in the uniformed services;

(B) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the benefits; and

(C) the condition of such person has not been determined by the Secretary of Veterans Affairs to be service-connected.

(d) A person who leaves a civilian job for service in the uniformed services after the 60-day period beginning on the date of the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1991 shall give written or verbal notice to such person's civilian employer that service in the uniformed services will cause such person to be absent from scheduled civilian employment, except that no notice is required in circumstances in which giving notice is impossible or unreasonable, including but not limited to circumstances where providing notice is precluded by military necessity, as determined by the uniformed service concerned, with such determination not being subject to judicial review.

(e) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

(1) if such person's period of service was 181 days or more, within one year;

(2) if such person's period of service was 31 days or more but less than 181 days, within six months; or

(3) if such person's period of service was less than 31 days, within a period of time that is equal to the period of service concerned.

(f)(1) In the case of a benefit provided by an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)), or a benefit provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this subsection.

(2) Subject to subsection (g)(2), a person reemployed under this chapter—

(A) shall not be treated as having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services; and

(B) shall have each period served by such person in the uniformed services deemed to constitute service with the employer or employers maintaining the plan for purposes of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan,

if such person meets the eligibility criteria under this chapter.

(g)(1) An employer reemploying a person under this chapter shall be liable to an employee benefit pension plan for funding any obligation of the plan to provide the benefits described in subsection (f)(2). For purposes of determining the amount of such liability, and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1145) or for purposes of any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed to be service with the employer pursuant to such subsection shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (f)(2) that are derived from employee contributions only to the extent the person makes payment to the plan with respect to such contributions (not to exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of deemed service described in subsection (f)(2)).

(h) Any person who is absent from or leaves a position (other than a temporary position) in the employ of any employer for voluntary or involuntary service in the uniformed services may utilize, during any period of such service, accrued or other leave which the person could have utilized if the person had remained in such position.

SUBCHAPTER III—PROCEDURES FOR ASSISTANCE AND ENFORCEMENT

§ 2041. Assistance in obtaining employment or reemployment; assistance in asserting claims with respect to State or local government or private employers

(a) The Secretary (through the Veterans' Employment and Training Service) shall provide assistance in obtaining employment or reemployment to any person entitled to rights or benefits under this chapter. The Secretary may use existing Federal and State agencies engaged in similar or related activities and the assistance of volunteers.

(b) Any person who claims that a private employer or a State or political subdivision thereof has denied or is about to deny such person any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

§ 2042. Assistance in obtaining employment or reemployment by the Federal Government

(a) Except as provided in subsections (c), (d), and (e), if a person is entitled to be reemployed under section 2032 by the Federal Government, such person shall be reemployed in a position as described in sections 2033 and 2034.

(b) Any person who claims that the Federal Government, as employer, has denied or is about to deny such person any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

(c) If the employer of a person described in subsection (a) was, at the time such person entered service in the uniformed services, an agency in the executive branch, and the Director of the Office of Personnel Management determines that—

> *(1) such employer no longer exists and its functions have not been transferred to another part of the executive branch; or*
>
> *(2) it is not feasible for such employer to reemploy such person,*

the Director shall further identify an alternative position of like seniority, status, and pay for which such person is qualified in another part of the executive branch, and the Director shall cause employment in such position to be offered to such person.

(d) If the employer of a person described in subsection (a) was, at the time such person entered service in the uniformed services, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that—

(1) it is not feasible for such employer to reemploy such person; and

(2) such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5,

such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch on the same basis as described in subsection (c).

(e) If the adjutant general of a State determines that it is not feasible to reemploy a person who was a National Guard technician employed under section 709 of title 32, and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(d) of title 5, such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch of the Federal Government on the same basis as described in subsection (c).

§ 2043. Enforcement of employment or reemployment rights with the Federal Government

(a) Any person who claims that—

(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by the Federal Government; and

(2)(A) such employer has failed or refused to comply with the provisions of this chapter; or

(B) the Office of Personnel Management has failed or refused to comply with the provisions of this chapter,

may file a complaint with the Secretary, and the Secretary shall investigate such complaint. Subsection (a) of section 2051 shall be applicable to such investigation but not subsections (b) and (c) of such section.

(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint. Before the receipt of a written complaint, the Secretary shall, upon request, provide advice or technical assistance to the potential claimant and, if the Secretary determines it appropriate, to such claimant's employer.

(c) If the Secretary, after investigation, is reasonably satisfied that such a violation has occurred, if efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation before the Merit Systems Protection Board, the Secretary shall refer the case to the Office of the Special Counsel. If the Special Counsel is reasonably satisfied that the person requesting representation is entitled to the rights or benefits sought, the Special Counsel shall appear and act as attorney for the claimant in filing an appeal to the Merit Systems Protection Board and in pursuing that appeal.

(d) If the Special Counsel refuses to represent a person after receiving a referral from the Secretary or if a person chooses not to apply to the Secretary for assistance or to utilize the Special Counsel for representation under this section, such person may be represented before the Merit Systems Protection Board by counsel of the person's choice.

(e)(1) If the Merit Systems Protection Board concludes that the Federal Government, as employer, has failed or refused to comply with the provisions of this chapter or that the Director of the Office of Personnel Management has not met an obligation set forth in subsection (c), (d), or (e) of section 2042, the Board shall enter an order specifically requiring the employing agency or the Director to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of the employing agency's or the Director's unlawful action.

(2) Any such compensation shall be in addition to and shall not be deemed to diminish any of the other rights or benefits provided for by this chapter.

(f)(1) A claimant under this chapter may petition the United States Court of Appeals for the Federal Circuit to review a decision of the Merit Systems Protection Board denying such claimant the relief sought, in whole or in part, subject to the conditions and in accordance with the procedures set forth in section 7703 of title 5.

(2) The Secretary and the Special Counsel shall not represent persons with respect to review of decisions of the Merit Systems Protection Board under this chapter in the United States Court of Appeals for the Federal Circuit or the Supreme Court.

(3) If a person seeks such judicial review, or in any case in which a person is involved in the Board's decision being appealed by another party, such person may be represented by counsel of the person's choice.

§ 2044. Enforcement of employment or reemployment rights with a State or private employer

(a) A person who claims that—

(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by a State or political subdivision thereof or a private employer; and

(2) such employer or potential employer has failed or refused to comply with the provisions of this chapter,

may file a complaint with the Secretary, and such complaint shall be investigated under the provisions of subchapter IV.

(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint. Before the receipt of a written complaint, the Secretary shall, upon request, provide advice or technical assistance to the potential claimant and, if the Secretary determines it appropriate, to such claimant's employer.

(c) If the Secretary, after investigation, is reasonably satisfied that such a violation has occurred, if efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation, the Secretary shall refer the case to the At-

torney General. If the Attorney General is reasonably satisfied that the person requesting representation is entitled to the rights or benefits sought, the Attorney General shall appear and act as attorney for the claimant in the filing of a complaint and other appropriate motions and pleadings and the prosecution thereof.

(d)(1) If any employer which is a private employer or a State or political subdivision thereof fails or refuses to comply with the provisions of this chapter, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the rights or benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the other rights or benefits provided for by this chapter.

(2)(A) No fees or court costs shall be charged or taxed against any person claiming rights or benefits under this chapter.

(B) In any action or proceeding to enforce a provision of this chapter by a person described in subsection (a) who obtained private counsel for such action or proceeding, the court, in its discretion, may award any such person who prevails in such action or proceeding a reasonable attorney's fee, expert witness fees, and other litigation expenses.

(3) The court may use its full equity powers, including temporary or permanent injunctions and temporary restraining orders, to vindicate fully the rights or benefits of persons under this chapter.

(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

(5) If the Attorney General refuses to represent a person after receiving a referral from the Secretary or if a person chooses not to apply to the Secretary for assistance or to utilize the Attorney General for representation under this section, such person may be represented before the district court by counsel of the person's choice.

(6) In any action under this chapter, only the employer shall be deemed a necessary party respondent.

(7) No State statute of limitations shall apply to any proceedings under this chapter.

(8) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) If reasonably satisfied that the provisions of this chapter have been willfully violated by a private employer or a State or political subdivision thereof, the Attorney General may file a pleading in a district court of the United States in which the private employer concerned maintains a place of business, or in which the State concerned or political subdivision thereof exercises authority, for the assessment of a civil penalty against such employer. If, as a result of the proceeding resulting from such a filing, the employer is found to have willfully failed or refused to comply with any provision of this

chapter, a civil penalty of not more than $25,000 for each such failure or refusal may be assessed against such employer, taking into consideration criteria established in regulations by the Secretary for such purpose.

SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

§ 2051. Conduct of investigation; subpoenas

(a) In carrying out investigations under this chapter, the Secretary's duly authorized representatives shall at all reasonable times have access to, for the purpose of examination, and the right to copy and receive, any documents of any person or employer.

(b) In carrying out investigations under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply (other than with respect to an investigation carried out under section 2043(a)) to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the Secretary's subpoena.

(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter (other than an investigation carried out under section 2043(a)). The district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court (other than with respect to an investigation carried out under section 2043(a)).

SUBCHAPTER V—MISCELLANEOUS PROVISIONS

§ 2061. Regulations

(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

(b)(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to the Federal Government as employer. Such regulations shall be consistent with the regulations pertaining to the States and private employers, except that employees of the Federal Government may be given greater or additional rights. Nothing in this subsection constitutes authority for the Director to prescribe any matter for which any regulation may be prescribed under paragraph (2).

(2) Regulations may be prescribed—

(A) by the Merit Systems Protection Board to carry out its responsibilities under this chapter; and

(B) by the Office of Special Counsel to carry out its responsibilities under this chapter.

(3) It is the sense of Congress that the Federal Government should be a model employer with respect to the requirements of this chapter.

§ 2062. Reports

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 2043(c) and no later than February 1, 1992, and each February 1 thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.

(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 2044(c) or 2043(c), respectively, during such fiscal year.

(3) The number of pleadings filed by the Attorney General pursuant to section 2044(e) during such fiscal year.

(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).

(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

§ 2063. Severability provision

If any provision of this chapter, or the application of such provision to any person or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it held invalid, shall not be affected thereby.".

PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 53—SPECIAL PROVISIONS RELATING TO BENEFITS

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§ 3103A. Minimum active-duty service requirement

(a) * * *

(b)(1) * * *

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(3) Paragraph (1) of this subsection does not apply—

(A) * * *

* * * * * * *

(E) to benefits under chapter 19 of this title; [or]

(F) to benefits under chapter 30 of this title by reason of—

(i) a discharge or release from active duty for the convenience of the Government, as described in sections 1411(a)(1)(A)(ii)(II) and 1412(b)(1)(A)(iv) of this title;

(ii) a discharge or release from active duty for a medical condition which preexisted service on active duty and which the Administrator determines is not service connected, as described in clauses (A)(ii)(I) and (B)(ii)(I) of section 1411(a)(1) of this title and in section 1412(b)(1)(A)(ii) of this title;

(iii) an involuntary discharge or release from active duty for the convenience of the Government as a result of a reduction in force, as described in clauses (A)(ii)(III) and (B)(ii)(III) of section 1411(a)(1) of this title and in section 1412(b)(1)(A)(v) of this title; or

(iv) a discharge or release from active duty for a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as described in section 1411(a)(1)(A)(ii)(I) of this title[.]*; or*

(G) to reemployment benefits under chapter 43 of this title.

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TITLE 5, UNITED STATES CODE

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CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

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SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

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§ 1204. Powers and functions of the Merit Systems Protection Board and Special Counsel

(a) The Merit Systems Protection Board shall—

(1) hear adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, [section 2023] *chapter 43* of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

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CHAPTER 35—RETENTION PREFERENCE, RESTORATION, AND REEMPLOYMENT

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[SUBCHAPTER II—RESTORATION AFTER ACTIVE DUTY OR TRAINING DUTY

[3551. Restoration; Reserves and National Guardsmen.]

* * * * * * *

[SUBCHAPTER II—RESTORATION AFTER ACTIVE DUTY OR TRAINING DUTY

[§ 3551. Restoration; Reserves and National Guardsmen

[An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who is ordered to active duty or to duty under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard is entitled, on release from duty within the time limits specified in section 9(g) of the Military Selective Service Act of 1967 (50 U.S.C. App. 459(g)), to be restored to the position held by him when ordered to duty. However, a Reserve or member of the National Guard who leaves a position for which the salary is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives is entitled on release from active duty to be restored only under the provisions of section 459 of title 50, appendix, United States Code.]

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SECTION 706 OF

TITLE 10, UNITED STATES CODE

§ 706. Administration of leave required to be taken pending review of certain court-martial convictions

(a) * * *

* * * * * * *

(c)(1) A member required to take leave under section 876a of this title is not entitled to any right or benefit under [section 202] *chapter 43* of title 38 solely because of employment during the period of such leave.

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SECTION 631 OF

TITLE 28, UNITED STATES CODE

§ 631. Appointment and tenure

(a) * * *

* * * * * * *

[(j)(1) A magistrate who is inducted into the Armed Forces of the United States pursuant to the Military Selective Service Act of 1967 (50 U.S.C. App. 451 et seq.), or is otherwise ordered to active duty with such forces for a period of more than thirty days, and who makes application for a leave of absence to the district court or courts which appointed him, shall be granted a leave of absence without compensation for such period as he is required to serve in such forces. Every application for a leave of absence under this subsection shall include a copy of the official orders requiring the magistrate's military service. The granting of a leave of absence under this subsection shall not operate to extend the term of office of any magistrate.

[(2) A magistrate granted a leave of absence under this subsection who—

[(A) receives a certificate of service under section 9(a) of the Military Selective Act of 1967 (50 U.S.C. App. 459(a)), or is released under honorable conditions from the military service,

[(B) make application for reinstatement to regular service in office as a magistrate within ninety days after he is released from such service or training or from hospitalization continuing after discharge for a period of not more than one year, and

[(C) is determined by the appointing court or courts in the manner specified in subsection (a) of this section to be still qualified to perform the duties of such position, shall be reinstated in regular service in such office.

[(k)]*(j)* Upon the grant by the appropriate district court or courts of a leave of absence to a magistrate entitled to such relief [under the terms of subsection (i) of this section,] *under chapter 43 of title 38,* such court or courts may proceed to appoint, in the manner specified in subsection (a) of this section, another magistrate, qualified for appointment and service under subsections (b), (c), and (d) of this section, who shall serve for the period specified in subsection (e) of this section.

[(l)]*(k)* A United States magistrate appointed under this chapter shall be exempt from the provisions of subchapter I of chapter 63 of title 5.

SECTION 9 OF THE

ACT OF MARCH 22, 1991

SEC. 9. VETERANS READJUSTMENT APPOINTMENTS.

(A) * * *

* * * * * * *

(d) EFFECTIVE DATE.—The amendments made by this [Act] *section* shall apply only to appointments made after the date of the enactment of this Act.

○